DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(1)

PROCEEDINGS AND ORDERS

DATE: 12038

CASE NBR: 86-1-05610 CFH
SHORT TITLE: Thomas, Donald W.
VERSUS: Kemp, Warden

DOCKETED: Oct 1 1986

Date	Proceedings and Orders
Oct 1 1986	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Oct 31 1986	Brief of respondent Kemp, Warden in opposition filed.
Nov 6 1986	DISTRIBUTED. November 26, 1986
Dec 1 1986	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

1pp

PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FIIMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

No. 86-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD WAYNE THOMAS,

Petitioner,

-v-

86-5610

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGE H. KENDALL
88 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 523-5398

STEPHEN B. BRIGHT
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

COUNSEL FOR PETITIONER

101 pp

QUESTION PRESENTED

Whether the absolute denial of counsel at the Preliminary Hearing in a capital murder proceeding can ever be subject to the harmless error determination; and if so, is such a denial harmless where the State's key witness testifies free from cross-examination at the Preliminary Hearing and later gives inconsistent and contradictory testimony at trial?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 86-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD WAYNE THOMAS,

Petitioner,

-v-

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner Donald Wayne Thomas respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Eleventh Circuit, dated July 28, 1986, granting habeas corpus relief as to penalty but denying relief as to conviction.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is officially reported at 796 F.2d 1322 (11th Cir. 1986), and is annexed as Appendix A.

The opinion of the United States District Court for the Northern District of Georgia is not reported and is annexed as Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was rendered on July 28, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

The case also involves the following statutory provisions which are set forth in Appendix C: O.C.G.A. §17-7-20 et seq.

STATEMENT OF THE CASE

A. Trial Proceedings

On April 11, 1979, nine-year-old Dewey Baugus left his home in the early evening to attend a baseball game at a nearby field. He was last seen alive on his way home after the game. The following day, a missing person report was filed with the police. Eight days later, on April 19, 1979, the body of Dewey Baugus was discovered near railroad tracks not far from his home.

Donald Wayne Thomas, a 19-year-old black youth who suffers from schizophrenia, was charged with the murder after Linda Cook, a fifteen-year-old retarded girl, and Enzor Lowe, Petitioner's alcoholic stepfather, told police that Mr. Thomas had admitted committing the crime.

Ten days after his arrest, authorities transported Mr. Thomas to court for his Preliminary Hearing, held pursuant to O.C.G.A. §17-7-20, et seq. Despite the fact that Petitioner was unrepresented by counsel, and requested the assistance of counsel, the Court proceeded with the Hearing. Two state witnesses testified, the key witness at his later trial, Linda Cook, and a police officer. Petitioner cross-examined neither witness and informed the Court at the end of the hearing that the accusations were "lies". Preliminary Hearing Transcript, April 29, 1979, at 9. (Hereinafter, PH Tr.). See, Appendix D.

Shortly after the Preliminary Hearing, substantial questions arose as to Mr. Thomas' competency to stand trial. After an early June examination, Dr. Lloyd Baccus, a well respected forensic psychiatrist, reported that Mr. Thomas "had no idea of the month or day," that during the examination he "became increasing restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands", that he had symptoms "clearly indicative of a diagnosis of schizophrenia", and that Mr. Thomas was "so substantially impaired . . . as to be unable to assist his attorney in the presentation and implementation of his defense." Record on Appeal at 1a-2a. (Hereinafter, RA).

A second psychiatrist who examined Mr. Thomas several weeks later, noting symptoms similar to those observed by Dr. Baccus, was unable to make a definite diagnosis or state an opinion as to his competence to stand trial. RA at 3a-4a. A third report, received from Central State Hospital after a period of in-patient evaluation, indicated that Mr. Thomas was "partially oriented", of "borderline" intelligence, and was suffering from a "thought disorder, which resembles that of a schizophrenic process". RA at 5a-6a.

At trial, the State linked Mr. Thomas to the crime only through the testimony of Linda Cook and Enzor Lowe. Ms. Cook was fifteen (15) years old with very limited mental abilities, State Habeas Corpus Transcript at 64, (Hereinafter, SHC Tr.), RA5-118, and her trial testimony was often not consistent with testimony she gave at the Preliminary Hearing where she was not subjected to cross-examination. Trial Transcript at 351, 359, 364. (Hereinafter, Tr.). She testified that Mr. Thomas had claimed credit for the homicide and had taken her to the body. Neither she nor Enzor Lowe ever claimed that they witnessed the homicide.

Enzor Lowe, a chronic alcoholic, first testified that Linda Cook, rather than Mr. Thomas, told him that Petitioner had committed the crime. Tr. 387. The prosecutor eventually refreshed his recollection with an earlier statement in which he had stated that he had heard Petitioner make this assertion. Lowe later

testified that he did not at that time believe Mr. Thomas' claim because he was laughing and appeared "high". Tr. 388, 390. Lowe later recanted his trial testimony, claiming that he never heard Petitioner take any credit for the Baugus murder. SHC Tr. at 219-26.

Both witnesses appeared at trial literally as hostages of the State. Ms. Cook had been held at the Juvenile Detention Center on a material witness bond for six (6) months prior to trial. Tr. 368-70. Despite having been granted immunity, when testifying at trial, she freely admitted that she was scared that if her testimony did not go well, she would be returned to the Detention Center. Tr. 367, 374. Enzor Lowe also appeared at trial while detained on a material witness bond. Several days before trial, the police came to his home at 2:00 A.M. and took him to jail where he remained throughout the trial. Tr. 395. No other forensic or circumstantial evidence linked Mr. Thomas to the homicide. Mr. Thomas consistently denied any involvement in the homicide. At the conclusion of the guilt phase of the trial, the jury returned a verdict convicting Mr. Thomas of the murder.

The penalty phase of the trial commenced thereafter. After defense counsel offered no evidence in mitigation, the jury was instructed that it could return a sentence of death if it found that the murder was "outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind." After asking the Court when Mr. Thomas would be eligible for parole if he received a life sentence, and after receiving instructions that the question could not be answered, Trial Tr. 569-570, 596, the jury sentenced Mr. Thomas to death.

B. Prior Proceedings

On automatic appeal, the Georgia Supreme Court affirmed Mr. Thomas' conviction and sentence of death on April 23, 1980. Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980). This Court then granted Mr. Thomas' petition for certiorari on November 17, 1980 and vacated the sentence of death and remanded the case to the Georgia Supreme Court "for further consideration in light of

Godfrey v. Georgia, 446 U.S. 420." Thomas v. Georgia, 449 U.S. 988 (1980).

On remand, Mr. Thomas filed a "Motion for Full Briefing and for Oral Argument on Remand to This Court" in the Georgia Supreme Court. Without addressing the motion, and without the benefit of briefs or arguments, the Georgia Supreme Court reinstated the death sentence on March 31, 1981. Thomas v. State, 247 Ga. 233, 275 S.E.2d 318 (1981), cert. denied, 452 U.S. 973 (1981).

Thereafter, Mr. Thomas sought habeas corpus relief from the Superior Court of Butts County, Georgia. On February 11, 1982, the court conducted a hearing and gave counsel thirty (30) days from the date of the hearing for the filing of a post-hearing memorandum. Nevertheless, before expiration of the thirty (30) days and before the memorandum was filed, the court denied all relief on March 8, 1982. A Motion to Vacate Denial of Petition for Writ of Habeas Corpus was subsequently filed by Petitioner and denied by the Court on March 16, 1982. The Georgia Supreme Court denied issuance of an Application for Certificate of Probable Cause to Appeal on June 2, 1982. This Court denied certiorari. Thomas v. Zant, 459 U.S. 981 (1982).

C. The Proceedings Below

After having exhausted all state remedies, in May of 1984, Mr. Thomas filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Georgia, alleging that both his conviction for murder and sentence of death stood in contravention of the federal constitution. While preparing for an evidentiary hearing before that court, counsel for Petitioner learned for the first time that Mr. Thomas had not been represented by counsel at his Preliminary Hearing. After promptly exhausting this claim in the state courts, Petitioner sought to amend his federal habeas corpus petition to add the claim regarding the denial of counsel. RA. at 27. The District Court entered its Judgment and Order on July 19, 1985, and dealt with this motion in this order. Appendix B at 5-10. The court denied Petitioner's motion to amend into the petition the claim

that the absence of counsel at the Preliminary Hearing violated the Sixth Amendment, and alternatively held that any such error was harmless. Appendix B at 7. The District Court granted relief as to sentence, finding that the failure of trial counsel to uncover and present compelling evidence in mitigation constituted a violation of the Sixth Amendment right to counsel. It also held that the failure of the trial court to adequately instruct the jury as to the meaning and function of mitigating circumstances violated the Eighth Amendment. R4-32. The District Court finally denied all relief as to conviction.

Both Mr. Thomas and the respondent warden filed notices of appeal. After full briefing and oral argument, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court. Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986). With regard to the absence of counsel claim, the Court of Appeals affirmed only on the basis that the claim constituted harmless error in this case. See, 796 F.2d at 1326-27.

Neither party sought rehearing from the Court of Appeals. On September 16, 1986, pursuant to a motion filed by Mr. Thomas, the Court entered an Order recalling its mandate and staying issuance of the mandate should Mr. Thomas file a Petition for Writ of Certiorari in this Court on or before September 30, 1986. See, Appendix E.

C. Basis For Federal Jurisdiction

Jurisdiction was conferred on the United States District Court for the Northern District of Georgia pursuant to 28 U.S.C. §2241 and §2254.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether the absolute denial of counsel at a critical stage of the criminal justice process can ever be subject to harmless error analysis where such denial takes place in a capital murder proceeding. Petitioner, who was indigent and suffering from schizophrenia, was forced to proceed with his Preliminary Hearing in this proceeding without the benefit of counsel and in the absence of any waiver. On prior occasions, this Court has indicated that such denial requires automatic reversal. The Court below ignored this authority and, after applying a shorthand version of the Chapman v. California, 386 U.S. 18 (1967) test, found that the denial was harmless in this case. Certiorari is appropriate to clarify whether the absolute denial of counsel at a critical stage in a capital case can ever be harmless, and if so, under what circumstances.

I. THE TOTAL DENIAL OF COUNSEL AT A PRELIMINARY HEARING IN A CAPITAL PROCEEDING MANDATES A RULE OF AUTOMATIC REVERSAL

On numerous occasions, this Court has unequivocally held that the assistance of counsel is "a fundamental component of our criminal justice system." United States v. Cronic, ___ U.S. ___, 104 S.Ct. 2039, 2043 (1984). This is so because most criminal defendants, regardless of other skills, lack the training to even minimally protect their basic rights and interests in today's criminal court. Competent defense attorneys are an absolute necessity because "they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail' . . ." Cronic at 2043.

The right to counsel as recognized by this Court over the years reaches beyond the trial itself. The Court has identified several critical stages which occur prior to trial where "the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to

have effective assistance of counsel at the trial itself." United States v. Wade, 388 U.S. 218, 227 (1967)(pretrial line-up); Coleman v. Alabama, 399 U.S. 1 (1970)(preliminary hearing). In Coleman, several factors led the Court to conclude that the presence of counsel is essential at a preliminary hearing.

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as an early psychiatric examination or bail.

399 U.S. at 9.

Because of the importance of the right, this Court has repeatedly held that the complete denial of counsel calls for reversal of the conviction regardless of the strength of the State's evidence in a particular case. See, Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (1986); Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984); United States v. Cronic, ___ U.S. ___, 104 S.Ct. 2039 (1984). The rationale for this rule is that unlike most errors of constitutional magnitude, the effect of which can be reliably determined from examination of the record, prejudice from a complete denial of counsel "is so likely that case by case inquiry into prejudice is not worth the cost." Strickland v. Washington, ___ U.S. at ___, 104 S.Ct. at 2067.

The Court of Appeals below mistakenly assumed that the federal harmless error rule applied to the total denial of counsel at Mr. Thomas' Preliminary Hearing. It is true that while the defendant in Coleman was forced to proceed at his preliminary hearing without counsel, this Court did not automatically reverse the conviction. Instead, the Court

remanded the case for a determination of harmless error pursuant to Chapman v. California. 399 U.S. at 11. Although the Chapman test remains the law in the setting of non-capital cases, this Court has explained since that an automatic reversal rule is proper in the setting of a capital case. In Holloway v. Arkansas, 435 U.S. 475 (1978) Chief Justice Burger, writing for the majority, clearly carved out such an exception in capital cases.

> Moreover, this Court has concluded that the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, (cite omitted). Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.

435 U.S. at 489.

This exception is justified for at least two reasons. This Court has repeatedly held that capital cases should be tried under circumstances designed to heighten the reliability of the proceeding, not ones which inject uncertainty into the process. Beck v. Alabama, 447 U.S. 625 (1980); Turner v. Murray, ___ U.S. ___, 106 S.Ct. 1638 (1986). Certainly the absence of counsel, an indispensable ingredient to the fundamental fairness of any critical stage of the process, shortchanges the fairness of that proceeding. While subject to a harmless error finding in certain non-capital circumstances, the risk of prejudice is too great to tolerate counsel's absence in the capital setting.

Second, the task of determining just how a defendant has actually been prejudiced by counsel's absence at a critical stage is a more complex undertaking in the capital setting. The missed opportunity to cross-examine a key state witness at a preliminary hearing could deprive the defense of important impeachment material which could raise enough doubt about the witness' credibility to warrant conviction for a lesser offense, for a sentence of less than death, or for outright acquittal. The determination of the harmfulness of this missed opportunity

is often "unascertainable". United States v. Lane, ___ U.S. ___, 106 S.Ct. 725, 745 (1986)(Stevens, J. concurring).

Petitioner's case underscores the desirability for a rule of automatic reversal. The State's case against him came from the mouths of but two witnesses, former girlfriend Linda Cook, and stepfather Enzor Lowe. Because Lowe appeared before the jury as an alcoholic and was thoroughly impeached as to whether he had ever heard Mr. Thomas take credit for the homicide, the jury had to believe Linda Cook to convict. She was the State's case against Mr. Thomas. Her testimony at trial was confused and she had difficulty remembering even the address where she and Mr. Thomas had lived together. While trial counsel was able to impeach Ms. Cook utilizing her direct examination at the Preliminary Hearing, no such impeachment was available from cross-examination at that hearing solely because Mr. Thomas was made to proceed there pro se. Had counsel been present at the Preliminary Hearing, it is very likely that additional impeachment material would have been available at trial. The absence of cross-examination is one of the primary factors the Coleman Court held was highly relevant in assessing prejudice in the non-capital setting. 399 U.S. at 9. The court below failed to address this important factor in this case where the credibility of Ms. Cook was so important to the State's case and where it had already been damaged. Additional impeachment from a cross-examination at the Preliminary Hearing could very well have been decisive in this capital case.

There is no question that the hearing held in this case was a critical stage in the Georgia criminal process. See, State v. Hightower, 236 Ga. 58, 222 S.E.2d 333 (1976); Neal v. State, 160 Ga. App. 498, 287 S.E.2d 399 (1981). There is also no question that Petitioner did not waive his right to be represented by counsel at this hearing. Brewer v. Williams, 430 U.S. 387 (1977). There is also little doubt that because of Ms. Cook's inability to recall even the basic, historical facts about this case in any consistent fashion, the denial of counsel at the Preliminary Hearing did significant harm to Petitioner's

defense. Because the Court of Appeals treatment of this question is not consistent with prior announcements of this Court and fails to address the unique harm it caused Petitioner's defense, this Court should grant to decide if the denial of counsel can ever be harmless and if so, under what circumstances in a capital proceeding.

CONCLUSION

For the foregoing reasons, Petitioner submits that this petition should be granted.

Respectfully submitted,

GEORGE H. KENDALL
88 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 523-5398

STEPHEN B. BRIGHT
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

COUNSEL FOR PETITIONER

No. 86-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD WAYNE THOMAS,

Petitioner,

-v-

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon Respondent by depositing copies of same in the United States Mail, with proper first class postage affixed thereto, addressed as follows:

Mary Beth Westmoreland, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This the 30th day of September, 1986.

ATTORNEY FOR PETITIONER

APPENDIX "A"

have affected" the sentencing decision. *Skipper*, — U.S. at —, 106 S.Ct. at 1673.

VI. Trial Judge's Failure to Recuse

[14] Tafero's pro se motion on the day of the trial to disqualify the judge was denied on the grounds that it was untimely and legally insufficient. We need not address the state's claim that Tafero's failure to timely file his motion precludes federal habeas review, for we find that Tafero's claim has no merit. On direct appeal, the Supreme Court of Florida found Tafero's alleged grounds insufficient stating: "No personal bias or prejudice has been demonstrated in this case. The mere fact that Judge Futch was, in the distant past, a highway patrol officer does not support a claim of bias or prejudice on the judge's part. Tafero presented nothing to warrant the judge's disqualification." *Tafero v. State*, 403 So.2d 355, 361 (Fla.1981). We agree that no showing of personal bias exists, and the facts alleged were not such that a reasonable person would be convinced that a bias existed. *United States v. Archbold-Newball*, 554 F.2d 665, 682 (5th Cir.), *cert. denied*, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1977). Although the trial judge's alleged attendance and emotional reaction at Black's funeral may have constituted adequate grounds for him to recuse himself, these facts did not mandate recusal or constitute a disqualification.

VII. Co-Defendants' Life Sentences

[15] Tafero contends that his death sentences were arbitrarily imposed when compared to the life sentences received by Jacobs and Rhodes. We agree with the finding of the Supreme Court of Florida that the evidence establishes that Tafero "did the shooting and probably was the leader of the group." *Tafero v. State*, 403 So.2d 355, 362 (Fla.1981). The Supreme Court of Florida reversed Jacobs's death sentences and remanded for resentencing on the grounds that the trial court improperly failed to accept the jury's recommendation of life imprisonment. *Jacobs v. State*, 396 So.2d 713, 718 (Fla.1981). In addition, the Supreme Court of Florida found two valid aggravating factors and a mitigating factor. Tafero's situation is distinguishable in that not only did the jury recommend death, but the Supreme Court of Florida found four valid aggravating factors and no mitigating factors. Rhodes's case, in which he received two life sentences based upon his pleas to second degree murder and kidnapping, is clearly distinguishable in that his role in the murders is one of lesser involvement and of lesser culpability. *Tafero v. State*, 403 So.2d at 362.

We have examined Tafero's claims that: (1) the trial court denied Tafero his right to self-representation; (2) Tafero was denied a fair trial by the inherently prejudicial atmosphere surrounding the proceedings; (3) the trial court erred in failing to determine whether Tafero knowingly and intelligently waived his right to present mitigating evidence or affirmatively participate in his sentencing; and (4) the denial of Tafero's request to take a polygraph examination denied him due process at the sentencing stage, and find them without merit.

Accordingly, the district court's denial of the petition for writ of habeas corpus is affirmed.

AFFIRMED.

Donald Wayne THOMAS,
Petitioner-Appellee,
Cross-Appellant,
v.
Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 85-8650.

United States Court of Appeals,
Eleventh Circuit.

July 28, 1986.

State court defendant who received death sentence in murder prosecution filed habeas corpus petition. The United States District Court for the Northern District of Georgia, No. C84-941-A, Richard C. Freeman, J., granted relief, and appeals were taken. The Court of Appeals, Roney, Circuit Judge, held that: (1) record supported district court's decision that petitioner was prejudicially denied effective assistance of counsel when trial counsel failed to investigate and present mitigating evidence at sentencing phase; (2) district court's finding that petitioner failed to present state trial court with sufficient evidence to require competency hearing was not clearly erroneous; and (3) absence of defense counsel at preliminary hearing in state court was harmless error.

Affirmed.

1. **Habeas Corpus ⇐85.1(2)**

State court finding of effective assistance of counsel, as mixed question of law and fact, was not entitled to presumption of correctness under federal habeas statute. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

2. **Habeas Corpus ⇐90.2(3)**

District court which found state record insufficient to permit determination, in federal habeas proceeding, of whether trial counsel's decision not to present mitigating evidence at sentencing was strategic or negligent properly held evidentiary hearing. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

3. **Habeas Corpus ⇐85.5(11)**

Statements of defendant that he did not want to take the stand and did not "want anyone to cry for him" did not support finding of waiver of use of character witnesses at sentencing phase of capital murder prosecution, and thus, record in habeas proceeding supported district court's decision that trial counsel's failure to investigate and present mitigating evidence, including testimony from defendant's mother, and other family members or individuals who knew defendant, constituted ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

4. **Habeas Corpus ⇐85.5(11)**

Record in habeas proceeding supported district court's decision that defense counsel's rendering ineffective assistance by failing to investigate and present mitigating evidence at sentencing phase of capital murder prosecution was prejudicial; several witnesses would have given testimony in mitigation concerning defendant's difficult home environment, that he was excellent worker, and that he was loving son. U.S.C.A. Const.Amend. 6.

5. **Habeas Corpus ⇐113(12)**

District court's finding that habeas petitioner failed to present to the state trial court sufficient evidence to create legitimate doubt as to his competency and to require competency hearing was not clearly erroneous; evidence included testimony of one witness concerning alleged incident of prior irrational behavior six months before trial, evidence of petitioner's behavior at trial, conflicting psychiatric reports, and certification of staff doctors at state hospital that petitioner was competent to stand trial.

6. **Criminal Law ⇐1166(1.10)**

Absence of defense counsel at preliminary hearing in state court was harmless error where defense counsel had access to transcript of preliminary hearing, could not have revealed defects in state's case so great that magistrate would have refused to bind defendant over to state's custody, and where counsel knew nature of state's case because he conducted pretrial interviews with witnesses.

7. **Jury ⇐108**

Excusal for cause, at guilt/innocence phase of capital murder trial, of venirepersons opposed to death penalty did not violate defendant's right to impartial and representative jury. U.S.C.A. Const.Amend. 6.

Mary Beth Westmoreland, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellant, cross-appellee.

Stephen B. Bright, George H. Kendall, ACLU of Georgia, Atlanta, Ga., for petitioner-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before RONEY, KRAVITCH and HATCHETT, Circuit Judges.

RONEY, Circuit Judge:

Donald Wayne Thomas was convicted by a jury in the Superior Court of Fulton County, Georgia, and sentenced to death for the murder of nine-year-old Dewey Baugus.[1] When the instant habeas corpus petition was filed in the federal court, the execution scheduled for May 15, 1984 was stayed. After an evidentiary hearing, the district court granted relief on two grounds: (1) ineffective assistance of counsel at the sentencing for failure to present mitigating evidence, and (2) a constitutionally insufficient jury charge as to mitigating circumstances at sentencing.

On the State's appeal, we affirm the grant of the writ on the ineffective assistance at sentencing. On Thomas' cross-appeal, we affirm the denial of relief on the other grounds considered by the district court: (a) failure of the state trial court to conduct an evidentiary hearing on competency to stand trial, (b) denial by the district court of leave to amend the habeas corpus petition to assert a claim of denial of right to counsel at the preliminary hearing, and (c) the exclusion of venirepersons opposed to the death penalty.

Ineffective Assistance of Counsel

[1, 2] Contrary to the State's argument, the state court finding of effective assistance of counsel, as a mixed question of law and fact, is not entitled to a 28 U.S.C.A. § 2254(d) presumption of correctness. *Solomon v. Kemp*, 735 F.2d 395, 401 (11th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 940, 83 L.Ed.2d 952 (1985). Since the district court found the state record insufficient to permit a determination of whether counsel's decision not to present mitigating evidence was strategic or negligent, it was proper to hold an evidentiary hearing. *Code v. Montgomery*, 725 F.2d 1316, 1321-22 (11th Cir.1984).

Thomas' lawyer made little effort to investigate possible sources of mitigation evidence. Although Thomas' mother, who was to be the main witness at the penalty phase, was interviewed, she was not present, for reasons not apparent from the record. No attempt was made to obtain possible mitigation testimony from other family members or individuals who knew Thomas from school, work, or the neighborhood. The lawyer testified that he made little effort to produce mitigating evidence because Thomas had stated that he did not want to take the stand and did not "want anyone to cry for him."

[3] Although a capital defendant's stated desire not to use character witnesses and refusal to testify limits the scope of required investigation, *Mitchell v. Kemp*, 762 F.2d 886, 889-90 (11th Cir.1985), the statements of defendant here do not support such a waiver. The record supports the district court's decision that counsel's failure to investigate and present mitigating evidence fell below an objective standard of reasonableness under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

1. The Georgia Supreme Court affirmed. *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 499 (1980). The United States Supreme Court vacated the death sentence and remanded the case to the Georgia Supreme Court "for further consideration in light of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)." *Thomas v. Georgia*, 449 U.S. 988, 101 S.Ct. 523, 66 L.Ed.2d 285 (1980). On remand, the Georgia Supreme Court reinstated the death sentence. *Thomas v. State*, 247 Ga. 233, 275 S.E.2d 318, *cert. denied*, 452 U.S. 973, 101 S.Ct. 3127, 69 L.Ed.2d 984 (1981).

A habeas corpus petition in state court was denied after an evidentiary hearing. The Supreme Court of Georgia denied a certificate of probable cause. The United States Supreme Court denied certiorari. *Thomas v. Zant*, 459 U.S. 982, 103 S.Ct. 318, 74 L.Ed.2d 295 (1982).

[4] The record likewise supports the district court's decision that the omission was prejudicial. Several witnesses would have given testimony in mitigation. Two faculty members of the Roosevelt High School, which Thomas attended, testified that had they been called to the sentencing hearing, they would have told the jury about Thomas' difficult home environment, about the mental and physical abuse which he encountered there, about his mother's drinking problem, and that Thomas, despite being a slow learner, had worked hard to improve his grades. Two former employers would have testified that Thomas was an excellent worker when given simple work assignments, was always punctual, and had suffered adverse consequences from his mother's drinking problem. Various family members would have testified that Thomas was a loving son who cared deeply for his mother. A psychiatrist could have presented testimony showing Thomas as a pathetically sick youngster who had struggled to succeed in life, both in school and on the job, despite a chaotic home environment and a major mental illness.

None of this evidence was presented to the jury at the sentencing phase as mitigating evidence. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if mitigating evidence had been presented to the jury. *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

Sufficiency of Jury Charge

The district court granted habeas corpus relief on the ground that a charge given at the sentencing phase of the trial failed to explain or define what constitutes a mitigating circumstance, and what function a mitigating circumstance serves in sentencing deliberations, relying on *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir.1983).

Although the recent *en banc* decision in *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986), unavailable to the district court at the time of its decision, casts considerable doubt on the district court's ruling, it is not necessary to decide that issue on this appeal. At the new sentencing hearing to which Thomas is entitled because of ineffectiveness of counsel, the sentencing court will be able to bring its procedures in line with current law.

Failure to Conduct Competency Hearing

[5] As to whether Thomas was mentally competent to stand trial, the district court heard testimony, received documentary evidence, and found that Thomas had failed to present the state trial court with sufficient evidence to create a legitimate doubt as to his competency. *See Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). This finding is reviewed under the clearly erroneous standard. *Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986). As previously noted by this Court:

> The Supreme Court has not attempted to promulgate a standard describing the quantum of doubt that must exist before a trial judge is required to conduct a *Pate* hearing.... [N]o single phrase has yet evolved that captures all nuances of the contours of *Pate*, and so a close review of the facts is required that we may make our independent constitutional assessment of whether sufficient doubt of competency existed within the time frame of the trial and immediately related proceedings.

Acosta v. Turner, 666 F.2d 949, 954 (5th Cir.Unit B 1982). Because of the difficulty of defining sufficient doubt under *Pate*, our review of the facts is an active one intended to assist in evolving a better grasp of legitimate doubt of competency to stand trial.

The district court examined three factors to determine whether Thomas was competent: evidence of Thomas' prior irrational behavior, Thomas' demeanor at trial, and medical opinion on Thomas' competency. *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975). These factors must be addressed in terms of what was known to the trial court at the time.

As to prior irrational behavior, the district court noted that while there was some trial testimony by Linda Cook, a chief prosecution witness, that Thomas had locked her in a closet for a week and had jumped on the body of the decedent when Thomas showed the body to her, this evidence was insufficient to trigger a *Pate* hearing. These alleged incidents occurred six months prior to trial, and the facts depended upon Cook's credibility. There was no other testimony that Thomas had displayed irrational behavior on other past occasions.

With regard to Thomas' behavior at trial, the district court found:

> After reading the initial briefs filed in this action the court was under the impression that the petitioner sat throughout his trial with his fist raised over his head in some kind of salute. One purpose of allowing argument on the competency claim at the evidentiary hearing was to enable the court to obtain a better understanding of exactly how the petitioner appeared at trial. At the evidentiary hearing the petitioner's trial counsel described the petitioner's hand and arm position while in court, as well as his general demeanor and appearance. Based on this testimony the court finds that although the petitioner's appearance and conduct were not, perhaps, what one would typically see in court and not how any attorney would like his client to appear, it was not so unusual or deviant that it would trigger the necessity of conducting a *Pate* hearing. The court notes that it is not unusual for criminal defendants to sit passively at trial. It is also clear that communication between the petitioner and his counsel had improved by the time of trial, and thus the trial judge observed the petitioner talking with his attorney, something he was unable to do to any meaningful extent soon after his arrest when his attorney first entered the case.

This analysis discounts the argument that conduct during the trial should require a *Pate* hearing.

As to the medical evidence available to the trial court, Thomas was examined by two psychiatrists in response to his plea of insanity. When they rendered conflicting reports, the trial judge had Thomas transferred to the Department of Human Resources to be examined by the staff at the State Hospital. After a month's examination, the staff doctors certified Thomas as competent to stand trial. The record supports the district court's finding that the medical evidence before the trial judge was insufficient to raise the level of doubt about Thomas' competency to the point that would require a competency hearing.

Leave to Amend

[6] The district court denied Thomas leave to amend his habeas corpus petition to add a claim that he was not represented by counsel at the preliminary hearing in state court. The district court held the request was unduly delayed, but that in any event, the absence of counsel at the preliminary hearing was harmless error. We affirm on this alternative ground.

The prosecution has carried its burden of persuading this Court that, even if constitutional error was established, the error was harmless. *Hutchins v. Wainwright*, 715 F.2d 512, 517 (11th Cir.1983) (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)), *cert. denied*, 465 U.S. 1071, 104 S.Ct. 1427, 79 L.Ed.2d 751 (1984). In *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), the Supreme Court noted the functions served by an attorney at a preliminary hearing:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

Id. at 9, 90 S.Ct. at 2003. *Coleman* applies a harmless error analysis to denials of counsel at preliminary hearings.

Thomas' counsel had access to the transcript of the preliminary hearing because he used the transcript to impeach the testimony of the State's main witnesses. Counsel could not have revealed defects in the State's case so great that the magistrate would have refused to bind the petitioner over to the State's custody. Thomas' counsel knew the nature of the State's case because he conducted pretrial interviews with witnesses, which led him to believe his best trial strategy would be to attack the credibility of those witnesses and impeach their testimony. Thomas' counsel sought and received early psychiatric examinations and evaluations on Thomas. The State has carried its burden on showing that Thomas was not prejudiced by his counsel's absence at the preliminary hearing.

Excusal of Jurors

[7] The argument that the excusal for cause at the guilt/innocence phase of his trial of those venirepersons opposed to the death penalty violated his right to an impartial and representative jury is foreclosed by the recent Supreme Court decision in *Lockhart v. McCree*, — U.S. —, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

AFFIRMED.

Bernard KAHLENBERG, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 84-6196.

United States Court of Appeals, Eleventh Circuit.

July 29, 1986.

Sharon B. Jacobs, Miami, Fla., for petitioner.

Leon Kellner, U.S. Atty., Miami, Fla., James A. Hunolt, Office of Immigration Litigation, Civ. Div., Washington, D.C., for respondent.

Before RONEY and KRAVITCH, Circuit Judges, and THOMAS*, Senior District Judge.

ORDER

In our opinion *Kahlenberg v. Ins.*, 763 F.2d 1346 (11th Cir.1985), we held that Mr. Kahlenberg was statutorily ineligible for adjustment of status as an investor since his application for adjustment of status was not approved on or before June 1, 1978, so as to qualify him as a non-preference immigrant thereby exempting him from the labor certification requirements of Section 212(a)(14) of the Immigration and Naturalization Act.

Our holding was influenced, to a large extent, by our reliance upon the Immigra-

* Honorable Daniel H. Thomas, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONALD WAYNE THOMAS,

Petitioner

vs.

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

CIVIL ACTION 84-941A

ORDER

This action is brought as a petition for a writ of habeas corpus. 28 U.S.C. § 2254. Petitioner Donald Wayne Thomas is currently confined at the Georgia Diagnostic and Classification Center at Jackson, Georgia, under a sentence of death. Respondent Ralph Kemp is named as the warden of that facility.

Procedural Background

On April 11, 1979, nine year old Dewey Baugus left his home in the early evening to attend a baseball game at a nearby field. He was last seen on his way home after the game. Eight days later, on April 19, 1979, Calvin Banks discovered the body of Dewey Baugus and notified the police.

Petitioner was indicted for the murder of Dewey Baugus on May 4, 1979. Petitioner pled not guilty and was tried in

Superior Court of Fulton County, Georgia. On October 24, 1979, a jury found him guilty. At the sentencing hearing the jury found one aggravating circumstance present: that the murder was "outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind." See Off'l Code of Ga. Ann. § 17-10-30(b)(7). Petitioner was sentenced to death on October 24, 1979.

The Supreme Court of Georgia affirmed the petitioner's conviction and sentence of death on April 23, 1980. Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980). The United States Supreme Court granted the petitioner's writ for certiorari on November 17, 1980. Thomas v. Georgia, 449 U.S. 986, 101 S.Ct. 523 (1980). The Supreme Court vacated the sentence of death and remanded the case to the Georgia Supreme Court "for further consideration in light of Godfrey v. Georgia, 466 U.S. 420." Id.

On remand, the Georgia Supreme Court reinstated the death sentence on March 3, 1981. Thomas v. State, 247 Ga. 234, 275 S.E.2d 318 (1981). Petitioner then filed his second petition for a writ of certiorari.

On June 22, 1981, the Supreme Court denied the second petition with Justice Brennan and Justice Marshall dissenting. Thomas v. Georgia, 452 U.S. 973, 101 S.Ct. 3127 (1981). Petitioner filed a petition for rehearing of the denial of certiorari, which was denied on September 23, 1981. Thomas v. Georgia, 453 U.S. 950, 102 S.Ct. 26 (1981).

Petitioner initiated state post-conviction proceedings by filing a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. That court held an evidentiary hearing on February 11, 1982, and subsequently denied all relief on March 8, 1982. A motion to vacate the denial of the petition for a writ of habeas corpus was filed by the petitioner. The court denied the motion on March 16, 1982. Petitioner's application for a certification of probable cause to appeal to the Georgia Supreme Court was denied on June 2, 1982.

On August 31, 1982, the petitioner filed his third petition for a writ of certiorari before the Supreme Court. The Court denied the petition on November 1, 1982. Thomas v. Zant, 459 U.S. 1138, 103 S.Ct. 773 (1983).

The instant petition was filed in this court on May 10, 1984. On May 11, 1984, this court entered an order staying the execution of the petitioner, which was scheduled for May 15, 1984. Petitioner asserts that he was convicted and sentenced to death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States for the following reasons: (1) the petitioner was denied effective assistance of counsel during his trial; (2) the record contains insufficient evidence of guilt to support a conviction for malice murder and a sentence of death; (3) the trial court failed to resolve conflicting psychiatric opinion concerning the petitioner's competency to stand trial; (4) the systematic exclusion for cause at the guilt phase of the trial of jurors

conscientiously opposed to the death penalty and the prejudicial exclusion of several other jurors who expressed doubts about the death penalty, denied the petitioner his right to a neutral, normally functioning jury that is representative of the community; (5) numerous practices of the prosecution and the trial judge served to deny the petitioner a fundamentally fair trial; (6) the prosecution's highly improper closing argument denied the petitioner his right to a fundamentally fair trial; (7) the malice charge given to the jury impermissibly shifted the burden of proof to the petitioner; (8) the trial court failed to give adequate instructions to properly channel the discretion of the jury during the penalty phase of the trial; (9) the statutory aggravating circumstance was applied in a vague and overbroad manner in the petitioner's case; (10) the petitioner's death sentence is the product of arbitrary and discriminatory factors which were not corrected due to fundamentally inadequate appellate review.

On October 11, 1984, this court granted the petitioner's motion for an evidentiary hearing on his claims that he received ineffective assistance of counsel and was put to trial while mentally incompetent. The hearing on these two issues was held on February 28 - March 1, 1985. The parties filed their post-hearing briefs in April 1985.

Motion to Amend the Petition

On June 17, 1985, the petitioner filed a motion for leave to amend the habeas corpus petition to add a claim that his right to counsel was violated because he did not have counsel at his preliminary hearing in state court. The State opposes the motion for leave to add this claim to the petition.

Petitioner seeks to amend his petition to include a claim that his Sixth, Eighth, and Fourteenth Amendment rights were violated because he was not represented by counsel at his preliminary hearing. Petitioner contends that the amendment will not prejudice the respondent because it presents a question of law that does not require the court to take proof on the issue. Petitioner also argues that he has not acted with undue delay in filing his motion because his counsel did not learn until January of this year that petitioner was not represented by counsel at the preliminary hearing.

Respondent contends that the court should deny the motion to amend on the grounds of undue delay. Respondent also notes that petitioner raised the same claim in a state habeas proceeding. The Superior Court of Butts County denied petitioner's leave to amend, finding that petitioner's counsel could have readily ascertained long before now that his client had not been represented at the preliminary hearing.

Rule 15(a), F.R. Civ. P., requires that leave to amend shall be freely given when justice so requires. In capital

punishment cases, as in other cases, the decision whether to grant leave to amend lies within the discretion of the trial court. See Moore v. Balkcom, 716 F.2d 1511, 1526-27 (11th Cir. 1983). The court may deny amendments if undue prejudice results to the opposing party or on the basis of the movant's undue delay, bad faith, or dilatory motive. See Foman v. Davis, 371 U.S. 917, 83 S.Ct. 230 (1962); Espey v. Wainwright, 734 F.2d 748, 750 (11th Cir. 1984).

Petitioner's counsel undertook representation of the petitioner in 1980 when the state habeas corpus proceedings were initiated. In denying the motion for leave to amend the petition, the state habeas corpus court concluded that:

> Through the most basic interview of Petitioner's trial counsel prior to the first habeas hearing, habeas counsel could have determined if Petitioner was represented at his commitment hearing. There is no assertion that trial counsel was not available. To the contrary, this habeas petition indicates that trial counsel was a witness at the hearing on the first habeas petition.... This Court can see no reason why this claim could not have been raised in the first petition.
>
> Finally, counsel's knowledge of this claim does not even depend upon the existence of the referenced transcript. Petitioner himself knew whether or not he was represented by an attorney at the hearing in April of 1979.

Second State Habeas Corpus order at 3.

After reviewing the parties' arguments on this motion and the evidence in the record of this case, this court finds that the petitioner has acted with undue delay in seeking to amend the

petition at this time. Petitioner's trial counsel, Mr. Coker, testified at the first state habeas hearing in 1982 when petitioner's present counsel was representing the petitioner. Counsel could have discovered that the petitioner had no counsel at the preliminary hearing at that time if he had asked Coker. At the petitioner's trial, Coker used specific testimony given by Linda Cook at the preliminary hearing in repeated attempts to impeach her credibility. Trial Transcript at 359-60, 364 ("Trial T."). See also Trial T. at 521, 523, 527. This court believes that a review of this portion of the trial transcript should have alerted petitioner's counsel to the fact that a transcript of the preliminary hearing existed. The court also notes that petitioner's counsel could have reviewed Coker's file on this case, and discovered the copy of the transcript, at any time during his representation of the petitioner. If petitioner's present counsel concluded that trial counsel's cross examination was based on notes taken at the preliminary hearing, early review of trial counsel's file would be all the more important.

Even if this court were to grant petitioner's motion for leave to amend, the court finds that petitioner's lack of representation at the pretrial hearing amounted to harmless error. Relying on Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978), the petitioner argues that depriving a defendant of counsel at any critical stage in the proceeding requires automatic reversal. Respondent contends that the petitioner's lack of counsel at the preliminary hearing constitutes harmless

error because petitioner's trial counsel had a copy of the preliminary hearing transcript and used it at trial to cross examine the State's witness.

Because the preliminary hearing is a critical stage in the proceeding under Georgia law, the petitioner is entitled to representation at the hearing. See State v. Mightower, 236 Ga. 98, 222 S.E.2d 333 (1976). In Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999 (1970), the defendant had not been represented by counsel at a preliminary hearing. The Court, recognizing the important role of counsel at a preliminary hearing, held that a preliminary hearing was a critical stage in Alabama proceedings and remanded the case for determination of whether the defendant's lack of representation constituted harmless error. The Eleventh Circuit also has referred to the harmless error principle. See Fleming v. Kemp, 748 F.2d 1435, 1442-3 n.26 (11th Cir. 1984).

In contrast to its opinion in Coleman, the Supreme Court in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978) stated in dicta that if a criminal defendant does not have counsel at a critical stage in the proceedings, automatic reversal is required. The Holloway opinion, however, did not reverse the Coleman decision or even refer to it. This court therefore concludes that the Coleman decision remains good law. Accordingly, the question before this court is whether the petitioner's lack of representation at the preliminary hearing constituted harmless error.

After carefully reviewing the record in this case the court finds that the petitioner's lack of counsel at this stage of the proceedings was harmless error. It is clear in this case that petitioner's counsel had access to the transcript of the preliminary hearing because he used it to impeach the testimony of Cook and Lowe at trial. Thus, even though petitioner's counsel was not present at the preliminary hearing, he was still able to effectively utilize important information that was produced at the preliminary hearing. See Coleman, 399 U.S. at 9, 90 S.Ct. at 2003. Another function of counsel at the preliminary hearing, highlighted by the Court in Coleman, is to expose fatal weaknesses in the prosecution's case. After reading the brief transcript of the preliminary hearing, this court fails to see how, if counsel had been present, he could have revealed defects in the State's case that were so great that the magistrate would have refused to bind the petitioner over. According to the Coleman opinion, another function of counsel at a preliminary hearing is to discover the case against his client. In the instant case, it is clear that petitioner's counsel knew the nature of the State's case against the petitioner because he did pretrial interviews with witnesses, which led him to believe his best trial strategy would be to attack the credibility of those witnesses and impeach their testimony. The last factor highlighted by the Court in Coleman is the importance of effective arguments on matters such as the necessity for early psychiatric examination or bail. The record shows that the petitioner was

not harmed by the lack of counsel in this area because his attorney sought and received psychiatric examinations and evaluations of the petitioner. Thus, even if the motion to amend the petition to add this ground for relief was not unduly delayed, the court would deny habeas corpus relief on the merits of the claim based on its conclusion that the lack of counsel at this stage of the proceeding constituted harmless error.

I. Ineffective Assistance of Counsel

The Sixth Amendment of the United States Constitution guarantees an accused the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449 n.14 (1970). A criminal defendant is deprived of that right if counsel fails to render "adequate legal assistance." Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S.Ct. 1708, 1716 (1980). To obtain a new trial on a claim of ineffective assistance, a convicted defendant must show "that counsel's representation fell below an objective standard of reasonableness" measured "under prevailing professional norms." Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 2065-66 (1984). A court presented with such a claim must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." 104 S.Ct. at 2066. Counsel is strongly presumed to have rendered adequate assistance and to have made all decisions in the exercise of reasonable professional judgment. Id.

An error by counsel, even if professionally unreasonable, warrants setting aside a conviction only if the convicted defendant proves that the error was prejudicial to the defense. Id. at 2067. A convicted defendant cannot carry this burden by showing that the errors had some conceivable effect on the outcome of the case. Id. However, a defendant need not show that counsel's errors more likely than not altered the result of the case. Id. at 2068. Instead,

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 2069. In applying the standards set forth in Strickland, "a court should keep in mind that the principles" stated by the court "do not establish mechanical rules," and a court "must consider the totality of the evidence before the judge or jury." Id. at 2069.

Petitioner alleges numerous shortcomings of his trial counsel, Robert Coker, including: failure to properly investigate and demonstrate the petitioner's incompetency to stand trial; failure to properly investigate the factual basis for an insanity defense; failure to make an opening statement; failure to conduct adequate voir dire to protect the petitioner's rights under Witherspoon v. Illinois, 391 U.S. 570, 88 S.Ct. 1770 (1968); failure to object to the court's response to the jury's request for instruction on parole eligibility; failure to seek pretrial

competency examinations for two important state witnesses; and failure to investigate and present evidence in mitigation at the penalty phase of the trial.

After carefully considering the record in this case as well as the testimony before this court in the evidentiary hearing, the court finds that many of the failures and omissions attributed by the petitioner to Coker fall short of being unreasonable or prejudicial under the Strickland standards.

Petitioner has not shown that Coker failed to properly investigate and demonstrate the petitioner's competency to stand trial or to investigate the basis for an insanity defense. After Coker visited the petitioner numerous times in jail, he requested that the petitioner be given a psychiatric examination. The request was granted and Dr. Lloyd T. Baccus found the petitioner incompetent to stand trial. Coker then filed a special plea of insanity. A second psychiatric evaluation was made by Dr. Sheldon B. Cohen, who was unable to arrive at a diagnosis and recommended that the petitioner be observed at Central State Hospital. Petitioner was sent to Central State where he stayed for approximately one month, receiving drug treatment and a psychiatric staffing. When Central State Hospital found the petitioner competent to stand trial, he was taken off medication and returned to jail to await trial. On the Friday before trial, Coker consulted Dr. Baccus about the possibility of pursuing an insanity defense, but was told that there was no basis for such a plea. Coker then abandoned the special insanity plea because he

thought it was futile and proceeded to trial. See State Habeas Corpus Order at 2-5. At the evidentiary hearing before this court, Coker testified that Dr. Baccus told him that if Coker called him to testify, he would have had to say that the petitioner was competent to stand trial and knew the difference between right and wrong. Federal Habeas Transcript, Vol. I at 33 ("Fed. Habeas T."). Coker testified that although Dr. Cohen's evaluation of the petitioner was equivocal, "there was at least an implication from Dr. Cohen's letter that he felt [the petitioner] might have been malingering." Id. Coker also stated that when he interviewed the petitioner's mother and aunt, he received no indication from them that the petitioner had any prior mental problems or had exhibited irrational behavior. Id. at 42. Coker also testified that after the petitioner was released from Central State, they were better able to communicate with each other. Id. at 35.

The court finds that Coker's investigation of the basis for an insanity defense and the petitioner's competency to stand trial was reasonable and within the range of professional norms. Even if the court accepted the petitioner's contention that Coker's investigation of the competency and insanity issues constituted unprofessional errors, the petitioner has failed to show prejudice as a result of the errors. Petitioner has made no showing that he could not distinguish right from wrong or acted under a delusional compulsion at the time of the crime. Nor has he shown that he was unable to understand the charges against him

and the nature of the proceedings, or to communicate with his attorney at trial. Thus, the petitioner has not established that there is a probability that but for Coker's alleged unprofessional errors, the result of the proceedings would have been different. Strickland, 104 S.Ct. at 2069.

The court finds that Coker's decision to make a brief opening statement was not an unreasonable tactical choice. Coker stated at the state habeas hearing that he did not know when the trial began whether the petitioner would testify and that he did not have a specific defense to present. Rather than attacking the credibility of the prosecution's key witnesses in his opening statement before their testimony, Coker chose to focus on this issue in his cross-examination. Although this strategy may not have been chosen by the majority of attorneys, the court cannot hold that this tactic fell below the objective standard of reasonableness set forth in Strickland. The court again notes that the petitioner has failed to show prejudice as a result of this decision.

Petitioner has failed to show that Coker's voir dire on Witherspoon and other issues was professionally unreasonable or prejudicial. Coker testified before this court that he thought he had cleared up any ambiguity that might have existed with his questioning of certain potential jurors and that he thought he had made it very difficult for the State to excuse jurors for cause based on their opposition to the death penalty. Fed. Habeas T., Vol. I at 51-54; see McCorquodale v. Balkcom, 721 F.2d

1493, 1497 (11th Cir. 1983) (en banc). The court finds that Coker's conduct of voir dire does not fall below the objective of the Strickland standard of professional reasonableness.

Petitioner's other challenge to Coker's voir dire examination also fails to establish that Coker was ineffective. Petitioner asserts that Coker failed to conduct voir dire in a manner designed to identify and challenge for cause those jurors who had biases in the areas of race, class, and sexual abuse which would prevent them from being fair and impartial jurors. Coker testified that his goal was to select an all-black jury if possible. Coker specifically rejected the idea of asking questions about jurors' racial attitudes because he feared there might be a negative backlash and he did not want to emphasize the racial aspects of the case. Because there was no direct evidence of sexual abuse, Coker also chose not to ask questions about jurors' attitudes towards sexual abuse. Given the facts of the case, the court finds that Coker's strategic choices on these voir dire issues fell within the norms of practice in the profession and were not unreasonable. Again, the petitioner has shown no prejudice from Coker's voir dire examination.

During deliberations in the penalty phase of the trial, the jury sent a note to the trial judge, requesting an instruction on "the soonest a person can be released if given a life sentence." Trial T. at 596. The judge responded that he was not permitted to answer the question. Petitioner argues that Coker's failure to object to the trial court's response constituted ineffective

assistance of counsel because Coker failed to protect the petitioner's right to be sentenced by means of accurate, reliable sentencing procedures. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983). The court notes, however, that the petitioner has not alleged that the trial judge's response to the jury inquiry was incorrect. Although the judge declined to accept the suggestion, Coker did suggest that the judge tell the jurors that they were to base their decision on the evidence presented in the case and the instructions given to them. This court finds Coker's response to the jury question to be reasonable, and thus this claim of ineffective assistance is without merit.

Petitioner's contention that Coker's failure to seek mental competency examinations for Cook and Lowe also falls short of showing ineffective assistance of counsel pursuant to Strickland. Coker testified that he did not think of seeking such examinations because, although he thought both witnesses were impeachable, he did not feel that they were incompetent. Fed. Habeas T. at 50-1. The court finds that Coker's failure to obtain competency examinations for these witnesses was not professionally unreasonable. The court observes that the petitioner has not shown that but for Coker's failure to obtain these competency examinations, the result of the petitioner's trial would have been different. Strickland, 104 S.Ct. at 2069.

In his final argument, the petitioner has successfully shown that Coker's failure to properly investigate and present mitigating evidence during the penalty phase of his trial constituted

ineffective assistance of counsel under the Strickland standards. The court will, therefore, order a new sentencing hearing for the petitioner based on its conclusion that there is a reasonable probability that the results of the sentencing phase of the trial would have been different if mitigating evidence had been presented to the jury and its finding that Coker's failure to present this evidence was prejudicial.

Accurate sentencing information is "an indispensible prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may never have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190, 96 S.Ct. 2909, 2933 (1976). In upholding the Georgia death penalty, the Supreme Court in Gregg noted that it was desirable for the jury to have as much information as possible when making a sentencing determination in a capital case and emphasized the importance of directing the jury's attention to "the particularized characteristics of the individual defendant." Id. at 206, 96 S.Ct. at 2941. The importance of focusing a jury's attention on the character and record of the individual defendant when the jury is deciding whether to inflict the death penalty has been reaffirmed in numerous Supreme Court opinions. See, e.g., Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2744 (1983); Enmund v. Florida, 458 U.S. 782, 798, 102 S.Ct. 3368, 3377 (1982); Beck v. Alabama, 447 U.S. 625, 638, 642, 100 S.Ct. 2382, 2390, 2392 (1980); Godfrey v. Georgia, 446 U.S. 420, 427-428, 100 S.Ct. 1759, 1764-5 (1980).

In its recent decision in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), the Eleventh Circuit, focusing on the importance of mitigating circumstances, found that the defendant's counsel was ineffective for failing to present mitigating evidence at the sentencing phase of a capital murder case. The court found actual prejudice from this omission and affirmed the district court's grant of the writ of habeas corpus as it pertained to the death sentence. See also King v. Strickland, 741 F.2d 1481 (11th Cir. 1983).

The evidence in the record of this case shows that Coker made few efforts to investigate possible sources of mitigation evidence. Coker testified that the petitioner had stated that he did not want to take the stand and did not "want anyone to cry for him." State Habeas Transcript at 87-88 ("State Habeas T."). Before trial he interviewed the petitioner's mother who was to be the main, if not the only witness, at the penalty phase. Petitioner's mother was present at the courthouse on the day of the sentencing hearing, however, for reasons which are still unclear, she did not testify.

Coker testified that he had made no attempt to investigate and obtain possible mitigation testimony from other family members or individuals who knew the petitioner from his school or work experience or from his neighborhood. Coker also stated that he did not recall considering calling any of the psychiatrists who had examined the petitioner as mitigation witnesses. State Habeas T. at 79-81.

It is clear from the records of the state habeas proceeding and the evidentiary hearing in this court that there were numerous people who could have appeared as mitigation witnesses. At the state habeas hearing former employers, teachers, counselors, coaches, family members, and friends testified as to the evidence they could have provided if they had been asked to appear on behalf of the petitioner. See, e.g., State Habeas T. at 91-139. Several of these same people testified at the hearing held in this court. Fed. Habeas T. Vol. I at 138-149; Vol. II at 137-157.

The court finds that Coker's failure to investigate and present some mitigating evidence cannot be excused as a strategic choice. The court holds that the failure to present any mitigation evidence during the penalty phase of the petitioner's trial severely undermines the confidence in the outcome of the sentencing hearing and that the petitioner suffered prejudice as a result. See Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985). The petition for writ of habeas corpus will be granted to the extent that it seeks a new sentencing hearing.

II. Sufficiency of the Evidence

Petitioner asserts that his conviction and sentence of death cannot stand because the State failed to demonstrate his guilt and the appropriateness of the death penalty with a sufficient quantum of reliable evidence. Petitioner argues that no rational trier of fact could have reasonably found the petitioner guilty

because the circumstantial evidence presented at trial fell short of satisfying the reasonable doubt standard and the two key prosecution witnesses were shown to be unreliable and their testimony was impeached.

Petitioner maintains that the testimony of the State's primary witnesses was not credible. Petitioner characterizes both Linda Cook and Enzor Lowe as "hostages" of the State at the time they appeared at trial because both of them had been detained on material witness bonds. Cook had been held at the Juvenile Detention Center for six months prior to trial and Lowe was picked up by police several days before trial and held in jail until the trial.

Petitioner also alleges that the testimony of Cook and Lowe reveals that their ability to recall the events of April 1979, prior to the petitioner's arrest was significantly limited. Lowe admitted that he is a chronic alcoholic and that he was drinking on the night that Thomas allegedly told him that he had killed the victim. Cook, who was fifteen years old at the time, was allegedly high for at least part of the evening when she allegedly viewed the body. At the state court habeas corpus hearing, the petitioner's trial counsel testified that Cook appeared to be retarded or of borderline intelligence. State Habeas T. at 64.

Petitioner maintains that the testimony of these witnesses was impeached by their own inconsistent and contradictory testimony. For example, at trial Cook denied that she and the

petitioner lived together prior to the time of the crime, but she later admitted that they had lived together when she was confronted with her testimony to that effect which she had given the preliminary hearing. Trial T. at 359. Petitioner also asserts that Cook gave inconsistent testimony about what the petitioner allegedly told her before they went to see the victim's body. Trial T. at 351 and 364. Lowe's testimony was shown to be unreliable, the petitioner maintains, because of contradicting statements Lowe made at the preliminary hearing and at the trial. Petitioner asserts that the reliability of Lowe's testimony was further undercut by the fact that Lowe recanted his testimony at the state habeas hearing, denying that the petitioner ever told him that he had killed anyone. State Habeas T. at 220.

Petitioner argues that the record before this court reveals that the case against the petitioner consisted of unreliable assertions of a circumstantial nature which do not satisfy the constitutional standard of proof beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). However, even if the evidence in the record is found to satisfy the Jackson v. Virginia standard, the petitioner asserts that the record is too uncertain and unreliable to serve as the basis for imposing a death sentence. Petitioner argues that the due process clause protects criminal defendants from being sentenced upon "improper or inaccurate information." Borzynski v. United States, 418 U.S. 424, 431, 94 S.Ct. 3042, 3047 (1974). When

these due process concerns are raised in a capital case, they take on special significance because the courts have recognized that there is an increased need for reliability when determining whether a death penalty is the appropriate sentence in a particular case. Cf. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197 (1977). Petitioner points out that in Tibbs v. State, 337 So.2d 788 (Fla. 1976), the Florida Supreme Court reversed a conviction and death sentence when it found that the weight of the evidence was not sufficient to support imposition of the death penalty.

Respondent argues that the credibility of the witnesses is a matter for the jury to decide, and thus the petitioner's challenge to the credibility and reliability of the prosecution's witnesses must fail. Respondent asserts that, pursuant to the Supreme Court's ruling in Jackson v. Virginia, the only question before this court is whether there was sufficient evidence to support the jury's verdict. Respondent contends that viewing the evidence in the record in the light most favorable to the prosecution establishes that there was sufficient evidence for a rational trier of fact to find that the petitioner was guilty beyond a reasonable doubt.

The prosecution's case against the petitioner was based on circumstantial evidence and the testimony of two witnesses. The testimony of these witnesses was inconsistent and contradictory at times. However, the evaluation of their credibility is a matter left to the jurors who saw and heard their testimony at

trial. The jury was also fully charged in circumstantial evidence and the reasonable-hypothesis rule pursuant to Ga. Code § 38-109. Thomas v. State, 245 Ga. 688, 690, 266 S.E.2d 499, 501 (1980). Under the standard established in Jackson v. Virginia, a federal habeas court, when faced with a record of facts supporting conflicting inferences, "must presume . . . that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." 443 U.S. at 328, 99 S.Ct. at 2793. Although the State's case had obvious weaknesses, a review of the record in the light most favorable to the prosecution convinces the court that a rational jury could have found the petitioner guilty of malice murder beyond a reasonable doubt.

III. Excusal of Jurors

A. Death Qualification of the Jury

Petitioner argues that the excusal for cause at the guilt/innocence phase of his trial of those venire persons opposed to the death penalty violated his right to an impartial and representative jury. The court finds this claim is precluded by the decision in Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), which is binding precedent on this court.

B. Witherspoon Issue

A state may exclude for cause on grounds of opposition to the death penalty only those venire persons who have "made unmistakably clear" that they would automatically vote against

the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them for making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21, 88 S.Ct. 1770, 1777 n.21 (1968) (emphasis supplied). As the Fifth Circuit has explained, "[O]nly the most extreme and compelling prejudice against the death penalty, perhaps only very nearly a resolve to vote against it blindly and in all circumstances, is cause to exclude a juror on Witherspoon grounds." Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979), adhered to en banc, 626 F.2d 396 (5th Cir. 1980). In a recent decision, the Supreme Court has modified the Witherspoon standard slightly. In Wainwright v. Witt, _____ U.S. _____, 105 S.Ct. 844 (1985), the Court stated that a juror could not be challenged for cause unless his views would "prevent or substantially impair the performance of his duties in accordance with his instructions and his oath." 105 S. Ct. at 852 (quoting Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980)).

Petitioner challenges the State's excusal for cause of venire person Frances Ogletree based on the following colloquy:

THE COURT: Mrs. Ogletree, the Court inquires, are you conscientiously opposed to capital punishment?

THE JUROR: Yes.

THE COURT: Would you automatically vote against the imposition of capital punishment without regard to any evidence that might develop in the trial of this case if you were selected as a juror?

THE JUROR: I believe I would go on the evidence.

THE COURT: Well, the question is, would you automatically vote against capital punishment without regard to any evidence that might be developed at the trial of the case?

THE JUROR: No. No.

THE COURT: Would your attitude toward the death penalty prevent you from making any impartial decision as to the defendant's guilt, again assuming that you are selected as a juror?

THE JUROR: I don't quite understand that, Judge Weltner.

THE COURT: Well, you said that you were opposed to capital punishment.

THE JUROR: Right.

THE COURT: I'm asking you whether that feeling on your part would prevent you from making an impartial decision as to the question of guilt or innocence?

THE JUROR: I'm afraid it would.

THE COURT: All right.

Trial T. at 37-39. The State then moved that the juror be excused for cause and defense counsel objected. The court finds that Ogletree's statement that she was "afraid her feeling on capital punishment would prevent her from making an impartial decision on guilt or innocence indicates that she was reluctant to admit a fact that may be displeasing." Collins v. Francis, 728 F.2d 1322, 1338 (11th Cir. 1984). As the court noted in Collins:

> This type of statement, 'is the kind of statement that we give the trial judge discretion in weighing. Unlike the statements in the cases the petitioner cites, this statement is as a matter of law capable of being uttered with sufficient force to justify a Witherspoon exclusion. The trial judge had the opportunity to notice whether the statement was in fact so uttered and concluded that it was. His findings of fact as to a juror's impartiality, in light of the Witherspoon criteria, are presumptively correct.' 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539, 547, 101 S.Ct. 764, 769 (1981).

Id. at 1338. Applying the reasoning of Collins, this court finds no error in the exclusion of this juror for cause.

Petitioner challenges the excusal for cause of juror Evelyn Thompson. When Thompson was asked if she were conscientiously opposed to capital punishment she indicated that she was. However, when she was first asked if she would automatically vote against the death penalty Thompson answered that she would not. When asked if her feelings would prevent her from making an

impartial decision on the question of guilt or innocence, she answered that she did not know. The trial judge then explored the juror's view further with the following question:

> Well, let me explain to you that under the procedure of the State, in a case where the death penalty is sought, the jury first determines whether or not a defendant is guilty or innocent, without considering the question of punishment. Only, of course, if the defendant is found guilty would the question of punishment be considered. Now, I am asking you, would your attitude on capital punishment render you unable to make an impartial decision as to the question of guilt or innocence?

Trial T. at 114. Thompson then responded, "I'm afraid it would." Id. As was the case with the questioning of juror Ogletree, the court concludes that Thompson's response to the judge's question shows that she was properly excluded for cause. See Collins v. Francis, 728 F.2d at 1338.

Petitioner challenges the excusal for cause of juror Evelyn Beachum. When first asked about her views on capital punishment, Beachum responded that she had never thought about it. In response to the court's question, Beachum stated that she would not automatically vote against imposition of a death sentence without regard to the evidence and that her attitude would not

prevent her from making an impartial decision on the question of guilt o. innocence. After further questioning, Beachum testified that she could not write out a jury verdict imposing a death sentence. The court then posed the following question:

> [rom the Court] What I have got to know under the law is this. Regardless of what the evidence might be in a case, is your feeling about capital punishment such that you would automatically vote against the death sentence, no matter what the evidence might be?
>
> THE JUROR: Okay, I don't like the death sentence, and I just feel that there could be another way of doing things, so--
>
> THE COURT: Now, answer my question. Notwithstanding that--
>
> THE JUROR: All right.
>
> THE COURT: --and regardless of what the evidence in the case might be, is your view of the death penalty such that under no circumstance would you ever vote to impose the death penalty.
>
> THE JUROR: No.
>
> THE COURT: Are you telling me that you can conceive of situations wherein you would vote to impose the death penalty?

> THE JUROR: Yes.
>
> THE COURT: And we are talking about voting to send someone to the electric chair to be electrocuted.
>
> THE JUROR: Mnh-hmm.
>
> THE COURT: Now, ma'am, answer this question. Is your attitude toward the death penalty as you have expressed it today, is that such as would prevent you from making an impartial decision as to the question of whether or not the defendant is guilty or innocent, independent of punishment?
>
> THE JUROR: I think I could make a fair judgment.
>
> THE COURT: About guilt or innocence?
>
> THE JUROR: About guilt or innocence.

Trial T. at 72-73. The State moved to excuse Beachum for cause at this point. The court, continuing its questioning of the juror, asked, "Is there any case that you can conceive that you would vote to send somebody to the electric chair to be executed?" Beachum answered, "No." Trial T. at 75.

The judge then excused Beachum from the courtroom to discuss her responses with counsel. The judge noted that Beachum's last response was unambiguous but was not what the juror had stated earlier. The judge then said, "I agree with you that she is quite ambiguous about it, but when it comes down to talking about

sending someone to the electric chair to be executed her ambiguity seems to fade away. I will have to grant the motion of the State." Trial T. at 76. Although Beachum's answers to the early questions indicated that she was uncertain as to her views and perhaps confused by some of the questions, in her final answer she unambiguously answered that she could in no case vote to impose a death sentence. Cf. McCorquodale v. Balkcom, 721 F.2d 1493, 1500-02 (11th Cir. 1983); Spencer v. Zant, 715 F.2d 1562, 1576-77 (11th Cir. 1983); King v. Strickland, 714 F.2d 1481, 1492-93 (11th Cir. 1983). The court finds no error in the exclusion of Beachum for cause.

Petitioner also challenges the excusal for cause of venire person Christine Reese. Reese stated that she was conscientiously opposed to capital punishment. When the judge asked her if she would consider voting for the death penalty under any circumstances, Reese said she would have to hear the evidence. The court then asked if there were some cases with some evidence in which she might vote for the death penalty. Reese answered, "under extreme cases, extreme, but I don't believe in capital punishment." Trial T at 287. The judge then elaborated on the question, inquiring whether "in an extreme case, as you might view that word, would you be willing to consider voting for the death penalty, in an extreme case?" Reese responded, "I don't think I could." Id. The prosecutor then asked if "there is any case where you yourself could go into a jury room and vote to

sentence someone to the electric chair at Reidsville." Reese replied, "No, ma'am." Id. at 288.

Examining the voir dire of Reese, the court finds that as the questioning of Reese continued her responses became less ambiguous as she indicated doubt that she could impose a death sentence, even in what she considered to be an "extreme" case. In her final response to a question about her ability to actually vote to impose the death penalty, Reese unambiguously stated that she could in no case vote to impose capital punishment. Cf. McCorquodale v. Balkcom, 721 F.2d 1493, 1500-02 (11th Cir. 1983). The court finds no error in the exclusion of Reese for cause.

In his petition for habeas corpus relief, the petitioner challenges the excusal for cause of Eddie Watkins, although no further arguments were made in support of petitioner's allegation with respect to Watkins. When questioning began Watkins stated that he was conscientiously opposed to the death penalty but he also stated that he would not automatically vote against imposing such a sentence. The judge then asked if Watkins could "conceive of a case wherein you would vote to impose capital punishment; that is, to vote to have a defendant convicted of murder, sent to the electric chair for electrocution." Watkins answered, "if the court, you know--no, I couldn't, no I wouldn't do that. No, I would not." Trial T. at 77. Watkins did testify that his opinions would not prevent him from making an impartial decision as to guilt or innocence. Upon defense counsel's request for clarification, the judge told Watkins that capital punishment

meant sending someone to the electric chair. Watkins stated, "No, I wouldn't vote that way." Id. at 78.

Watkins' response to the question about whether his attitudes concerning capital punishment would prevent him from making an impartial decision on the question of guilt shows that he was not excusable for cause on the second ground enumerated in Witherspoon. However, Watkins' unambiguous answer that he could not vote to impose capital punishment in any case establishes that Watkins was excludable for cause under the first Witherspoon ground; that is, because of his reservations about capital punishment, he would automatically vote against capital punishment. The court finds no error in the exclusion of Watkins for cause.

Petitioner also challenges the exclusion of Mrs. Richardson for cause. Richardson stated that she was against capital punishment, "it is a religious conviction of mine...I don't know...I don't think I could sentence anyone to death." Trial T. at 169. When asked by the judge whether she would not vote for the death penalty regardless of the evidence in the case, Richardson answered, "I really believe the answer to this is yes." Id. at 170. The court finds that Richardson's unambiguous response to this question made her properly excludable for cause under the first Witherspoon ground.

IV. Judicial Determination of Competency

The trial of a criminal defendant while he is mentally incompetent violates due process. See Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440 (1956). In Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 842 (1966), the Supreme Court held that when a bona fide doubt as to the defendant's competence appeared, the failure of the trial court to provide an adequate hearing on that issue sua sponte at the time of trial, violated the defendants rights. In Drope v. Missouri, 420 U.S. 162, 172-73, 95 S.Ct. 896, 904-05 (1975), the Court emphasized that the states must provide and follow adequate procedures to protect the due process right of a criminal defendant not to be tried while incompetent. In Drope, the Court set forth three factors that courts should consider in determining whether bona fide doubt exists as to the defendant's competency: evidence of prior irrational behavior, the defendant's demeanor at trial, and medical opinion on the defendant's competency. 420 U.S. at 180, 95 S.Ct. at 908. The presence of any one of these three factors may be sufficient to require a hearing. Id.; Lokos v. Capps, 625 F.2d 1258, 1262 (5th Cir. 1980).

The issues raised by a Pate procedural claim must be addressed in terms of what was known to the trial court. Lokos v. Capps, 625 F.2d at 1262-64. The test is an objective one which determines whether the trial court received information which, when objectively considered, should have raised a

reasonable doubt about the defendant's competency and alerted the trial court to the possibility that the defendant could not understand the proceedings, apreciate the significance of them, or assist his attorney in his defense.

In the order granting an evidentiary hearing on this issue, this court noted that in the petitioner's case there was evidence going to all three of the factors articulated in Drope. See Order of October 11, 1984, at 25-26. At the evidentiary hearing the parties presented testimony and documentary evidence relating to all three Drope factors.

After evaluating all the evidence in the record of this case on this issue, the court concludes that no Pate violation occurred when the trial court failed to conduct a competency hearing. Although there was some testimony at trial by Cook about unusual behavior by the defendant, the court finds this evidence was not sufficient to trigger the need for a Pate hearing. Cook testified about incidents that allegedly took place in or before April 1979, which was at best six months prior to the trial. Thus, even if the trial judge credited this testimony, it would not necessarily require that he conduct a competency hearing for the defendant to determine the petitioner's competency to stand trial in October. The court also notes that the trial judge heard no other testimony that the petitioner had displayed irrational behavior on other occasions in the past. Contra, Pate, 383 U.S. at 378-82, 86 S.Ct. at 836-40.

After reading the initial briefs filed in this action the court was under the impression that the petitioner sat throughout his trial with his fist raised over his head in some kind of salute. One purpose of allowing argument on the competency claim at the evidentiary hearing was to enable the court to obtain a better understanding of exactly how the petitioner appeared at trial. At the evidentiary hearing the petitioner's trial counsel described the petitioner's hand and arm position while in court, as well as his general demeanor and appearance. Based on this testimony the court finds that although the petitioner's appearance and conduct were not, perhaps, what one would typically see in court and not how any attorney would like his client to appear, it was not so unusual or deviant that it would trigger the necessity of conducting a Pate hearing. The court notes that it is not unusual for criminal defendants to sit passively at trial. It is also clear that communication between the petitioner and his counsel had improved by the time of trial, and thus the trial judge observed the petitioner talking with his attorney, something he was unable to do to any meaningful extent soon after his arrest when his attorney first entered the case.

The court also finds that the medical evidence before the trial judge was not sufficient to raise the level of doubt about the petitioner's competency so as to require a competency hearing. At the time of the trial the judge had three psychiatric reports about the petitioner that were made over a span of several months by three different doctors who had

examined the petitioner for different periods of time and in different circumstances. Although the first psychiatric report from Dr. Baccus stated that the petitioner was not competent to stand trial, that report was made on the basis of observations of the petitioner near the time of his arrest and initial period in jail. The second report, submitted by Dr. Cohen, was inconclusive and recommended that the petitioner be examined and observed at the state mental hospital. The most recent of these reports was a letter sent to the judge from Central State Hospital which certified the medical opinion of the doctors here that the petitioner was competent to stand trial. This report was made after the petitioner had spent aproximately a month at Central State Hospital. During that time he received drug treatment and a psychiatric staffing. He had also been observed and interviewed by the staff over a period of several weeks. The report sent to the trial judge noted that the petitioner's speech was logical, relevant, and coherent. Record at 16. Although the report stated that the tests performed at the hospital suggested thought disorders resembling a schizophrenic process, the doctors concluded that the petitioner was competent to stand trial. Because this last report was the most recent of the three psychiatric evaluations and was based on extended observation and treatment of the petitioner, this court finds it reasonable that the trial judge accepted the medical finding that the petitioner was competent without having the level of doubt that would have required a Pate hearing. Although the medical assessment of

competency cannot be substituted for a legal determination of competency, the medical findings have an important effect on the final judicial determination. The court also notes that unlike the situation in other cases relied on by the petitioner, the psychiatric reports which reached different conclusions as to the petitioner's competency were made at different times and were not all made near the date of trial. Contra, United States v. Caplan, 633 F.2d 534, 539-42 (9th Cir. 1980).

Evaluating the trial judge's conduct in failing to hold a Pate hearing in light of the evidence going to all three of the above factors does not change this court's conclusion that no Pate violation occurred. The judge knew that the petitioner had some mental problems and had initially filed a special plea of insanity. The trial judge sought additional psychiatric evaluations of the petitioner after receiving the first report from Dr. Baccus. The trial judge was observing a defendant who had undergone psychiatric evaluation for one month at the State hospital, who had been certified competent to stand trial by the hospital staff, and who communicated with his attorney at trial. This court concludes that there were insufficient indicia that the petitioner was incompetent to stand trial to warrant a Pate hearing at trial.

V. Denial of Fair Trial

Petitioner argues that numerous practices of the prosecution and trial judge operated to deny him his constitutionally

guaranteed right to a fair trial. See Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976). Petitioner complains of the following practices: the State failed to inform petitioner or his counsel of its intent to seek the death penalty until the first day of the trial; the State failed to serve its notice of aggravating circumstances on petitioner or defense counsel until the first day of the trial; the State did not permit defense counsel to review pretrial statements in advance of trial; the court permitted counsel for the State to lead her witnesses throughout the trial; the court allowed the prosecutor to re-examine her witnesses on previously unexplored matters; the court allowed counsel for the State to bolster the credibility of her witnesses; counsel for the State did not provide defense counsel with the full name of a witness in its case-in-chief until the morning of that witness' testimony; the court permitted a witness to testify to alleged misconduct by petitioner that was irrelevant and extremely prejudicial; and the court denied a defense motion for mistrial when a witness made statements that were highly prejudicial to petitioner.

Respondent denies that any of the practices complained of denied the petitioner his right to fundamental fairness under the Fourteenth Amendment. The State points out that these allegations were raised in the state court habeas corpus proceeding. See State Habeas Corpus Order at 11-12. The state court found that defendant's trial counsel received notice of the State's intent to seek the death penalty in pre-trial discussions with

the prosecutor. Respondent contends that this notice is sufficient under Georgia law, and thus did not result in the denial of a fair trial. See Bowden v. Zant, 244 Ga. 260, 263, 260 S.E.2d 465 (1979). At the state habeas proceeding, the petitioner's counsel stated that it was clear to him that only one of the statutory aggravating circumstances could apply to the case. The state court therefore found that the fact that the State failed to serve formal notice of the aggravating circumstance until the first day of trial did not affect counsel's preparation for trial. The state court also noted that the formal written notice given right before trial, when considered with the informal notice previously given to the petitioner's counsel, was sufficient to satisfy the state law requirements. See Franklin v. State, 245 Ga. 141, 149, 263 S.E.2d 666 (1980).

Respondent argues that the fact that the petitioner's counsel was not given access to the statements of the prosecution witnesses prior to trial did not result in the denial of a fair trial because counsel was given copies of the statements of the witnesses as they were called. Respondent maintains that the witnesses' statements were not subject to a notice to produce, and notes that the petitioner has not alleged that there were any exculpatory statements which the prosecutor did not disclose.

Respondent asserts that the petitioner's allegation that the prosecutor led her own witnesses during questioning is without merit because the petitioner's counsel raised objections on this point on several occasions which were properly ruled upon by the

trial court. Respondent also rejects the petitioner's contention that the prosecutor exceeded the permissible scope of re-direct examination. Respondent points out that the petitioner has not cited any specific examples of allegedly impermissible re-direct examination. The conduct of re-direct examination is within the discretion of the trial court, and thus the respondent argues that this court should accept the finding of the state habeas court that the trial court did not abuse its discretion in this matter.

Respondent also argues that the petitioner has failed to establish a due process violation with regard to his allegation that the prosecutor bolstered the credibility of the witnesses. The State notes that the state habeas court considered this claim and found it to be without merit.

Respondent maintains that the petitioner's claim that the State's failure to provide Roosevelt Tysinger's last name to the petitioner until the morning that Tysinger testified does not provide grounds for habeas corpus relief. Tysinger was an 11 year old friend of the victim and he testified as to when he had last seen the victim. Trial T. at 458-462. The prosecutor stated at trial that she had learned Tysinger's last name from other witnesses. When Tysinger appeared in court the prosecutor summarized his testimony and the court took a recess to allow the petitioner's attorney to talk to the witness. Trial T. at 426-427. Respondent argues that because the witness' last name was newly discovered and the court called a recess to allow the

defense counsel to interview the witness, no due process violation occurred.

Respondent asserts that the petitioner's objection to the re-direct examination of Cook also fails to state a due process violation. Although the petitioner does not describe the specific testimony which allegedly resulted in a violation of his due process rights, the respondent assumes that this claim centers on Cook's testimony that the petitioner kept her locked in a closet for a week. Respondent argues that this testimony was permitted on re-direct because, on cross-examination, the petitioner's trial counsel had asked Cook about how she and the petitioner were getting along and whether they fought frequently around the time of the crime. Trial T. at 373. Respondent maintains that because the petitioner's counsel initiated the questioning concerning the relationship between Cook and Thomas on cross-examination, the prosecutor properly elicited Cook's testimony that the petitioner had locked her up for a week. Respondent asserts that this testimony on re-direct was admissible and relevant. See State Habeas Corpus Order at 15.

Respondent maintains that the denials of the two motions for mistrials did not violate the petitioner's due process rights. The first motion for a mistrial was made during the testimony of the victim's mother when she stated that Cook was afraid of the petitioner. The trial court immediately instructed the jury to disregard the testimony. The second motion for a mistrial was prompted by the same witness' statement that she had met Cook

to you, from the way the victim was found, that the motive in this case is sexual molestation.

The trial judge overruled defense counsel's objection to this argument and the prosecutor again suggested that the crime had a sexual motive.

Petitioner asserts that the prosecutor's reference to an alleged homosexual molestation constitutes prejudicial misconduct which violated his right to a fair trial. Petitioner maintains that Georgia law prohibits counsel from introducing facts into a case which are not in the record, and which are calculated to prejudice a defendant and render a trial unfair. See, e.g., Hightower v. State, 135 Ga. App. 348, 217 S.E.2d 636 (1975). Imputation of homosexuality to a defendant is especially prejudicial, the petitioner contends, because it always tends to disparage a person in the juror's eyes. Petitioner alleges that the prosecutor's argument suggesting a sexual motive of the crime in the present case, in the absence of evidence to support such a theory, and the inference of homosexuality constitute prejudicial misconduct which violated the petitioner's constitutional rights. See Commonwealth v. Shain, 493 Pa. 360, 426 A.2d 589 (1981); Commonwealth v. Adkins, 468 Pa. 465, 364 A.2d 287 (1976); Brown v. State, 168 Tex. Crim. 67, 323 S.W.2d 954 (1959). The improper and inflammatory nature of the prosecutor's suggestion of a motive, the petitioner argues, cannot be construed as harmless. The possibility that the jury was unduly influenced by the prejudicial comment is so great, the petitioner contends,

"two weeks before Connie Thomas killed my son, or before somebody killed him." Trial T. at 473. The court again immediately instructed the jury to disregard the testimony and then sent the jury out of the courtroom. After the judge denied the motions for a mistrial the jury was brought back into court and the judge instructed them about the witness' comments and again instructed them to disregard the comments. Respondent asserts that the trial court properly denied the motions for a mistrial and that there was no due process violation in these circumstances.

After examining the parties' arguments on the due process issues this court agrees with the conclusion of the state habeas court and finds that the petitioner was not denied a fair trial. The specific problems cited by the petitioner were handled quickly and properly by the trial judge and this court concludes that no due process violations occurred.

VI. Closing Argument of the Prosecution in the Guilt/Innocence Phase

Petitioner argues that during the guilt/innocence phase of his trial, the prosecutor made improper and prejudicial remarks during her closing argument which denied him a fair trial under the Fifth, Eighth, and Fourteenth Amendments to the Constitution. Petitioner challenges the following statement by the prosecutor:

> Now the State does not have to prove a motive--I am not sure what the motive is in this case. I can suggest a motive to you and you can accept it or reject it, and I suggest

that he is entitled to a new trial free from such prejudicial misconduct.

Respondent argues that the prosecutor's comments were proper, did not render the trial fundamentally unfair, and were within the wide scope of permissible argument allowed in a closing argument. Respondent asserts that the prosecutor's suggestion of a sexual motive for the crime did not deprive the petitioner of his constitutional rights because the inference of a sexual motive was one that could be drawn from the evidence and was not so egregious as to deny the petitioner a fair trial. The State also denies the petitioner's allegation that the prosecutor's comments constituted an improper reference to facts not in evidence. Respondent also notes that after the trial judge overruled defense counsel's objection to the statement, he did give the jury a cautionary instruction. Trial T. at 110.

After examining the trial record and considering the parties' arguments, the court concludes that the prosecutor's comments were not so prejudicial that they rendered the petitioner's trial fundamentally unfair. See Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980). Although there was clearly no strong evidence to support the prosecutor's suggestion of a sexual motive, the court finds that the prosecutor's suggestion was not without any rational foundation in the record of the case. The court agrees with the respondent that the inference of a sexual motive for this crime would not necessarily be unreasonable or speculative in light of the evidence presented at trial. In

addition, the court notes that the prosecutor did not dwell on the suggested motive for a prolonged period of time or take it a central part of her closing argument to the jury.

VII. Charge on Implied Malice

Petitioner argues that the trial court's instruction to the jury that "malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart," Trial T. at 504, violates the due process clause. See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975). This exact charge was approved by the Eleventh Circuit in Mance v. Zant, 696 F.2d 940, 953 (11th Cir. 1983), which concluded that the charge did not relieve the prosecution from its burden of proving malice beyond a reasonable doubt. Petitioner argues, however, that in his case, unlike Mance, the instruction was not merely definitional because no intent instruction was given. Petitioner asserts that the malice instruction, when considered in light of the crime in this case, operated to shift the burden to the petitioner to show an absence of malice. The conviction should be vacated, the petitioner contends because the jury was not properly instructed with regard to this element of the crime.

The State asserts that the petitioner's challenge to this charge must fail because the charge has been approved by the Eleventh Circuit in Mance, which specifically found that the charge did not relieve the prosecution from its burden of proving

malice beyond a reasonable doubt. Id. at 953. The respondent argues that viewing this one charge in light of all the charges given and the case as a whole, the malice charge only defined one type of malice and did not shift the burden of proof on any element of the crime.

To prevail on this claim, the petitioner would have to show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400 (1973). After carefully reviewing the trial transcript, including the judge's preliminary instructions as well as the formal charges, Lamb v. Jernigan, 683 F.2d 1332, 1339 (11th Cir. 1982), the court finds that the malice instruction did not shift the burden of proof to the petitioner to establish the absence of malice.

In the instant case, the trial judge charged the jury at length on circumstantial evidence before giving the malice charge. Trial T. at 497-501. In light of the explicit directions about circumstantial evidence and the trial judge's repeated instructions that the prosecution had the burden of proof on all elements of the crime, the court concludes that, viewing the instructions as a whole, reasonable jurors would not have interpreted the implied malice charge as shifting the burden of proof to the petitioner. See Jarrell v. Balkcom, 735 F.2d 1242, 1256 (11th Cir. 1984); Hance v. Zant, 696 F.2d 940, 947 (11th Cir. 1983); Lamb v. Jernigan, 683 F.2d 1332, 1340 (11th Cir. 1982).

viii. Guiding the Discretion of the Jury During the Penalty Phase

The trial judge charged the jury on the statutory aggravating circumstance as follows: "the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind." Trial T. at 565. Petitioner argues that the trial judge failed to properly channel the jury's discretion concerning this statutory aggravating circumstance because the judge did not define any of the terms of Off'l Code Ga. Ann § 17-10-30 (b)(7) or provide any guidance as to how to apply the subsection to the facts of the case. Because an "aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2742-43 (1983), the petitioner contends that the failure of the judge to define the terms of subsection (b)(7) created the possibility that the jury could find that almost any murder fits the criteria of subsection (b)(7), thus giving the statutory aggravating circumstance impermissibly broad scope.

Respondent asserts that the words and phrases used in subsection (b)(7) are words of common understanding and meaning which did not require definition by the judge. Respondent notes that although the United States Supreme Court has examined the Georgia statutory aggravating circumstances in several cases, it

has not required trial judges to define the portion of subsection (b)(7) which was given in the instant case. See Cotto, v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). The court agrees with the respondent that the failure to define the terms in the portion of subsection (b)(7) which was given to the jury did not impermissibly broaden the scope of the aggravating circumstance. The court finds that the language used in the charge could be understood by a jury of lay people, and thus the trial judge did not fail to properly channel the jury's discretion in considering the application of subsection (b)(7) to the facts of the case.

Petitioner also challenges the charge given on mitigating circumstances, which reads as follows:

> Now members of the jury, you should consider all evidence submitted in both phases of the trial of this case in arriving at your verdict as to the sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case.

Trial T. at 567. Petitioner argues that this charge failed to clearly and unambiguously instruct the jury about its option to recommend a life sentence and the nature and role of mitigating circumstances. Petitioner maintains that the importance of clearly setting forth the function of mitigating circumstances in sentencing process has been emphasized in numerous cases in this circuit. In Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981) (Unit B), reh'g. denied, 456 U.S. 1111, 102 S.Ct. 1695 (1982), the court held that

> the eighth and fourteenth Amendments require that when a jury is charged with the decision whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also 'guide[] and focus[] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender. . . .' Jurek v. Texas, 428 U.S. at 274, 96 S.Ct. at 2957. In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is [footnote omitted] and what its function is in the jury's sentencing deliberations.

661 F.2d at 471.

Petitioner argues that an instruction to the jury that it is authorized to consider mitigating circumstances is not sufficient to satisfy the constitutional requirements. In Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983) the court found:

> Although the charge authorized the jury to consider circumstances in extenuation or mitigation . . . the court failed to explain what function such a consideration would play in sentencing deliberations. An authorization to consider mitigating circumstances is a hollow instruction when unaccompanied by an explanation informing the jury why the law allows such a consideration and what effect a finding of mitigating circumstances has on the ultimate recommendation of sentence.

Id. at 1701; see also Finney v. Zant, 709 F.2d 643 (11th Cir. 1983). Petitioner asserts that considering the charge as a whole in the instant case, it fails to adequately guide the jury as to the meaning and function of mitigating circumstances and thus fails to meet the criteria set forth in the case law of this

court noted that the United States Supreme Court has not prescribed the exact language which must be used in jury instructions in state courts. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2750 (1983). The Fourth Circuit found that it is "inappropriate for the federal courts on collateral review to go beyond the correction of fundamental errors implicating due process rights and attempt to prescribe the particular form which state jury instructions on mitigation must take, becoming mired in the nuances of definition and technicalities of draftsmanship." 750 F.2d at 1245.

After examining the charge on mitigating circumstances in light of all the charges given in the petitioner's case, the court finds that the charge failed to adequately define and explain the function of mitigating circumstances in the sentencing phase of a capital trial. See, e.g., Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984). Although the trial judge did instruct the jury on their option to recommend a life sentence, he did not tell the jury what mitigating circumstances are or what their function is in sentencing deliberations. Westbrook v. Zant, 704 F.2d at 1503; Spivey v. Zant, 661 F.2d at 471. The court concludes that the charge as given failed to guide and focus "the jury's objective consideration of the individual offense and the individual offender...". Jurek v. Texas, 428 U.S. 262, 274, 96 S.Ct. 2950, 2957 (1976). Accordingly, the court will grant the writ of habeas corpus to allow a new sentencing hearing for the petitioner.

circuit. Petitioner points out that a charge very similar to that given in the petitioner's case was recently struck down by the Eleventh Circuit. In Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984), the court found that the following charge failed to provide sufficient guidance to the jury concerning mitigating circumstances in the penalty phase of a capital trial.

> [H]aving found the defendant guilty of the offense of murder, it is now your duty to determine within the limits prescribed by law the penalty that shall be imposed as punishment for that offense. In reaching this determination, you should consider all of the evidence received by you in open court in both phases of trial. You should consider all the facts and circumstances of the case, including any mitigating or aggravating circumstances.

Id. at 775 n.2. The charge in the instant case is similarly flawed, the petitioner contends, and thus he is entitled to a new sentencing hearing.

Respondent argues that the charge, taken as a whole, complies with the requirements of Spivey. Respondent points out that after the judge instructed the jury that they should consider all evidence at the trial, including evidence of mitigating circumstances, he advised the jury of their option to recommend a life sentence even if they found aggravating circumstance. Trial T. at 567-568. Respondent also urges the court to consider the reasoning of the Fourth Circuit Court of Appeals in Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984). In Briley, the

IX. Aggravating Circumstance

The death penalty was imposed in the instant case on the basis of a finding that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." See Off'l Code Ga. Ann. § 17-10-30(b)(7). Petitioner challenges the application of this aggravating circumstance, arguing that it was applied in a vague and overbroad manner in violation of his Eighth and Fourteenth Amendment rights. Petitioner also asserts that the Supreme Court of Georgia failed to properly limit the scope of subsection (b)(7), but instead gave it a broad construction which would encompass any assault of lethal magnitude.

Subsection (b)(7) of the Georgia law has been challenged three times in the United States Supreme Court. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). Petitioner maintains that the Georgia Supreme Court ignored the Supreme Court's instructions in these cases that subsection (b)(7) must be narrowly interpreted so as not to apply to almost any murder. In the petitioner's case, the Georgia Supreme Court reaffirmed the death sentence after the Supreme Court vacated the earlier order of the state court. The Georgia Supreme Court held that the jury was authorized to find torture because the victim was subjected to serious physical and sexual abuse. Thomas v. State, 247 Ga. 233, 233-34, 275 S.E.2d

318, 319 (1981). Petitioner argues that the physical evidence from the body of the victim and the circumstances of the death do not support a finding of torture beyond a reasonable doubt. The evidence as to the circumstances of the victim's death came from the testimony of Cook and the medical examiner. Cook testified that the petitioner told her that he had killed the victim by "beating him with a stick and choking him to death." Id. at 234, 275 S.E.2d at 319. The medical examiner found antemortem bruises on the neck caused by strangulation, which was the cause of death. Trial T. at 434, 435, and 441. The examiner also found two lacerations on the top of the victim's head and minor bruises and abrasions on his arms and chest. Id. at 433. The testimony did not indicate whether these injuries were received before or after death. Petitioner claims that there was no evidence to suggest that the victim suffered prolonged physical abuse or pain before death which would support a finding of torture.

The Georgia Supreme Court based its finding of serious sexual abuse on the petitioner's prior record for child molestation and assault with intent to rape and on the fact that the victim's pants had been partially removed. Thomas v. State, 247 Ga. at 234, 275 S.E.2d at 319. Petitioner challenges this finding of sexual abuse, pointing out that such a finding was not made by the trial judge. Petitioner also notes that sexual abuse was only suggested as a possible motive by the prosecutor in her closing argument.

Petitioner asserts that a finding of sexual abuse should not be based on the fact that when the body was found the pants had been partially removed because Cook's testimony did not include this statement. Petitioner suggests that the absence of this fact in Cook's testimony supports the possibility that the pants may have been removed after the petitioner and Cook viewed the body. Petitioner also argues that his prior convictions provide no basis for either a jury or an appellate court to infer that the crime was committed in a certain manner.

Respondent asserts that the findings of the Supreme Court of Georgia demonstrate that the statutory aggravating circumstance was properly applied. On remand, the Supreme Court of Georgia, relying on Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), found that torture occurs when a victim is subjected to serious physical abuse before death. The court noted that serious sexual abuse may constitute serious physical abuse and that a defendant who tortures a victim or commits aggravated battery before killing the victim can be found to have a depraved mind. The court also stated that the age and physical characteristics of the victim could be considered in determining whether depravity of mind existed. Thomas v. State, 247 Ga. at 233-34, 275 S.E.2d at 319.

Respondent maintains that the Supreme Court of Georgia did not apply subsection (b)(7) in a vague and overbroad manner, but instead found that the characteristics and nature of this murder made it "distinguishable from ordinary murders in which the death

penalty is not appropriate." Id. Respondent contends that this conclusion is supported by numerous features of the crime. The court noted that this case was a strangulation murder of a 9 year old child who weighed less than 60 pounds, that the victim gave the petitioner no reasons to assault him and was not subjecting the petitioner to emotional trauma, that the petitioner sought to avoid discovery of the body, and that there was testimony that the petitioner had admitted to beating the victim with a stick and choking him to death. Respondent maintains that the decision of the Georgia Supreme Court shows that subsection (b)(7) was not vaguely applied in the instant case and that the record clearly supports a finding of torture in the form of serious physical abuse prior to death.

The court agrees with the petitioner that his prior convictions cannot serve as a basis from which to infer a motive or the circumstances of a particular crime. However, the court finds that there was sufficient additional evidence in the petitioner's case from which a jury or a court could properly find that the aggravating circumstance set forth in subsection (b)(7) existed. The physical evidence, the victim's age and size, the cause of death, and the absence of any evidence of provocation could all reasonably support a finding that the murder was outrageously or wantonly vile, horrible or inhuman. If a jury or a court credited Cook's testimony about the petitioner's alleged admission to her, the evidence supporting a finding of torture by means of serious physical abuse would be even stronger. This

court concludes that the application of the statutory aggravating circumstance in this case did not violate the petitioner's constitutional rights.

X. Evidence of Arbitrariness and Discrimination in the Sentence of Death

Petitioner argues that his sentence of death was imposed in an arbitrary and discriminatory manner, violating his rights under the Eighth and Fourteenth Amendments to the Constitution, and that the Supreme Court of Georgia failed to correct these violations in its appellate review. Petitioner's arguments in support of these alleged violations are the same as those decided adversely to the petitioner in McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984), aff'd, 753 F.2d 877 (11th Cir. 1985) (en banc). In the order of October 11, 1984, this court, noting that the McCleskey case was on appeal, adopted the findings and conclusion of the district court's opinion in McCleskey. The Eleventh Circuit Court of Appeals has now affirmed the district court in McCleskey, and thus the petitioner is not entitled to relief on his claims of arbitrariness and discrimination in sentencing. Petitioner's request for relief on these grounds will therefore be DENIED.

* * * * *

Accordingly, the court finds that the petitioner's rights were violated during the penalty phase of the trial as set forth above in sections I and VIII and therefore GRANTS the petition for habeas corpus relief to the extent it seeks a new sentencing hearing. Petitioner's sentence of death is VACATED and the respondent is ORDERED to hold a new sentencing hearing within 90 days of the date of entry of this order.

SO ORDERED, this 17th day of JULY, 1985.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

PERTINENT SECTIONS OF O.C.G.A. §17-7-20

17-7-21. Holding of court of inquiry by several judicial officers authorized; procedure for deciding questions.

The judicial officer before whom the accused is brought may associate with him, in the investigation, one or more justices of the peace, in which event a majority shall decide all questions. If there are only two presiding, the original justice shall determine all the questions where the court is not in agreement. (Orig. Code 1863, § 4612; Code 1868, § 4634; Code 1873, § 4731; Code 1882, § 4731; Penal Code 1895, § 907; Penal Code 1910, § 932; Code 1933, § 27-402.)

17-7-22. Powers of presiding officer in court of a municipal corporation to bind over or commit criminal offenders to jail.

Any mayor, recorder, or other proper officer presiding in any court of a municipal corporation shall have authority to bind over or commit to jail offenders against any criminal law whenever, in the course of an investigation before such officer, a proper case therefor is made out by the evidence. (Ga. L. 1880-81, p. 176, § 2; Code 1882, § 786c; Penal Code 1895, § 927; Penal Code 1910, § 952; Code 1933, § 27-423.)

17-7-23. Duties of court of inquiry generally; preclusion of certain courts from trying charges involving Code Section 16-11-126 or 16-11-128.

(a) The duty of a court of inquiry is simply to determine whether there is sufficient reason to suspect the guilt of the accused and to require him to appear and answer before the court competent to try him. Whenever such probable cause exists, it is the duty of the court to commit.

(b) Any court, other than a superior court or a state court, to which any charge of a violation of Code Section 16-11-126 or Code Section 16-11-128 is referred for the determination required by this Code section shall thereafter have and exercise only the jurisdiction of a court of inquiry with respect to the charge and with respect to any other criminal violation arising from the transaction on which the charge was based and shall not thereafter be competent to try the accused for the charge or for any other criminal violation arising from the transaction on which the charge was based, irrespective of the jurisdiction that the court otherwise would have under any other law. (Orig. Code 1863, § 4618; Code 1868, § 4640; Code 1873, § 4738; Code 1882, § 4738; Penal Code 1895, § 912; Penal Code 1910, § 937; Code 1933, § 27-407; Ga. L. 1980, p. 415, § 1.)

17-7-28. Hearing of evidence by court of inquiry generally; right of defendants to testify; effect of failure of defendant to testify.

The court of inquiry shall hear all legal evidence submitted by either party. If the defendant wishes to testify and announces in open court before the court of inquiry his intention to do so, he may testify in his own behalf. If he so elects, he shall be sworn as any other witness and may be examined and cross-examined as any other witness, except that no evidence of general bad character or prior convictions shall be admissible unless and until the defendant first puts his character into issue. The failure of a defendant to testify shall create no presumption against him, and no comment may be made because of such failure. (Orig. Code 1863, § 4614; Code 1868, § 4636; Code 1873, § 4733; Code 1882, § 4733; Penal Code 1895, § 910; Penal Code 1910, § 935; Code 1933, § 27-405; Ga. L. 1962, p. 453, § 1; Ga. L. 1973, p. 292, § 1.)

APPENDIX "D"

IN THE MUNICIPAL COURT FOR THE CITY OF ATLANTA
STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
VS.	)	Charge: Murder
	)	
DONALD W. THOMAS	)	

Official Proceedings before the Honorable E. T. BROCK, Judge; City of Atlanta Municipal Court, courtroom no. 2, 165 Decatur Street, S.E., Atlanta, Georgia; commencing at approximately 3:00 P.M., April 29, 1970.

APPEARANCE OF COUNSEL:

PAUL HOWARD Solicitor

THE COURT: Donald W. Thomas, you're charged with murder. How do you plea?

MR. THOMAS: Not guilty.

THE COURT: Has he had an opportunity to talk to an attorney?

MR. HOWARD: Yes, sir. We brought him back before Judge Matthews, I believe it was, last Thursday. At that time, we advised Judge Matthews that Mr. Thomas was already in custody in the Fulton County Jail. We gave him an opportunity to talk to a Public Defender, and Mr. Mikell interviewed him, and Mr. Thomas told him -- he said he wanted an attorney.

I had him brought back here before Judge Matthews, he stated at that time on the record that he did not desire to talk to a Public Defender; that he would get his own attorney.

THE COURT: Do you have that attorney here today, or do you wish to have an attorney?

MR. THOMAS: I don't know if I can get in touch with him or not. Mr. Stanfield is my attorney.

THE COURT: Mr. Stanfield -- he was just in the back hall a few minutes ago. I saw him. You have not talked to him?

MR. THOMAS: Yes, sir, I have talked to him.

MR. HOWARD: He must not be going to represent you?

MR. THOMAS: He said he would.

THE COURT: Do you wish to have this attorney here, young man? Have you hired him?

MR. THOMAS: Yes, sir.

THE COURT: Do you wish to have him here for this preliminary hearing?

MR. THOMAS: Yes, sir.

THE COURT: All right. Call Mr. Stanfield. Tell him we're waiting on him.

(Whereupon other cases were heard while the clerk tried to get in touch with Mr. Stanfield).

MR. HOWARD: Mr. Stanfield's office has informed us that he does not represent you.

THE COURT: Do you wish to proceed with this hearing, or do you wish to -- what do you wish to do?

MR. THOMAS: I still wish to have an attorney; not by the State.

THE COURT: You'll have to make some type of arrangement on your own, then. Did you tell Mr. Stanfield that this case was set for today?

MR. THOMAS: No, sir; I didn't, because I didn't know when this case was coming up. I just knew a few minutes ago.

THE COURT: Mr. Solicitor, what do you think?

MR. HOWARD: We had Mr. Thomas brought in here before the judge, and Mr. Mickell has tried to talk to him on three

different occasions. On each occasion he said emphatically that he did not want to be represented by a Public Defender, and that he would have his own attorney.

THE COURT: Is that right, young man?

MR. THOMAS: I don't want no State lawyer, sir. I would like to have my own lawyer.

THE COURT: We're going to proceed, then. You've had ample opportunity, young man, to get a lawyer, and if you did not make it clear and did not obtain one, then I think you have waived that right. This is the third appearance in court. This is not the first or second appearance, this is the third appearance. You had a hearing yesterday, and you had an opportunity today to contact an attorney, and you have not. We have given you ample time.

THE COURT: We will enter a not guilty plea. You may proceed, Mr. Solicitor.

EXAMINATION

LYNDA COOK

Having been previously duly sworn was examined and testified as follows:

EXAMINATION CONDUCTED

BY MR. HOWARD:

Q Would you please state your name for the record.

A Lynda Cook.

Q Miss Cook, do you know the defendant, Mr. Thomas?

A Yes, I do.

Q Did you see him on the 19th day of April this year?

A Yes, I did.

Q And would you tell the Court where you saw him at that time?

A At home. We were leaving at that time.

Q Who were you leaving with at that time?

A Mr. Thomas.

Q Now, Miss Cook, did you talk to Mr. Thomas on that day?

A Yes.

Q And did you talk to him at your house?

A Yes.

Q Now, do you remember what he was wearing on that day?

A Yes.

Q And what was he wearing?

A Beige pants and a blue shirt.

Q Now, at any time, did you see anything that you recognized as blood on the beige pants?

A Yes.

Q Now, when did that take place?

A Friday.

Q And would you explain when you saw the blood?

A When he came in.

Q And what time did he come in?

A Late.

Q Now, would you explain to the court what Mr. Thomas said to you after he came in?

A He said he had killed somebody.

Q You have got to keep your voice up. What did he say? He said he killed somebody?

A Yes.

Q He said he killed somebody, and what happened after he had made that statement?

A He told me to come on.

Q And what did you do at that time?

A I went with him.

Q Where did you go?

A On the railroad tracks.

Q And where are those railroad tracks located?

A On Hill and Grant.

Q When you got to the railroad tracks, what did you see there, if anything?

A A little boy laying down.

Q And would you described the little boy? What did you see?

A He had on blue pants and a red shirt.

Q What was the little boy's condition at that time?

A He was laying on his stomach.

Q Were you able to tell whether he was moving at that

time?

A No.

Q And what did Mr. Thomas do, if anything, at that time?

A He put his foot on his neck.

Q And what did he do after that?

A He started jumping on the boy's back.

Q He started jumping on the little boy's back?

A Yes.

Q And what did the little boy do?

A He didn't do anything.

Q Now, what did Mr. Thomas do after he started jumping on the little boy?

A He said he wanted to make sure he was dead.

Q And what happened after that?

A We left.

Q And what did he do with the little boy when he left?

A He through him in the bushes.

Q Did you at this time hear the little boy say anything?

A No.

Q Did you know that little boy?

A Yes, about a week.

Q You had seen him about a week before?

A I known him for about a week.

Q Now, did Mr. Thomas tell you why he killed the little

boy?

A No.

Q Did he tell you how he happened to kill the little boy?

A Yes.

Q What did he say?

A He said he hit him with a stick and choked him.

Q What happened to the beige pants that Mr. Thomas had on?

A He hid them.

Q And where did he hide them?

A In the back of the house.

Q Were you with him when he hid the pants?

A Yes.

Q Now, where was the blood on the pants that you saw?

A On the legs.

Q They were on the legs?

A Yes.

Q Did he hide the pants on the same night?

A Yes.

Q Now, what did you all do after you left the place where you left the little boy?

A We went home.

Q Now, exactly where did he leave the little boy's body?

A In the bushes.

Q And where were the bushes in relationship to the railroad tracks? How far were they from the railroad tracks?

A Right next to the railroad tracks.

Q They were right next to the railroad tracks?

A Yes.

Q Now, Miss Cook, when did you tell anybody that Mr. Thomas had killed the little boy?

A When he took me -- when he brought me down here.

Q And how many days was that after?

A A week.

Q A week after you saw the little boy?

A Yes.

MR. HOWARD: Your Honor, we have no further questions of this witness.

THE COURT: Mr. Thomas, do you wish to ask this witness any questions?

MR. THOMAS: No.

THE COURT: How old was the victim?

MR. HOWARD: Nine years old, Your Honor.

THE COURT: You heard the testimony that she saw you stamp and jump on this boy. Is there anything else you would like to say about that?

MR. THOMAS: The only thing -- those were lies. When I woke up, she was gone and she came back in about 10:30 that night. When she came back, I jumped on her.

THE COURT: Call your next witness, Mr. Solicitor.

EXAMINATION

OFFICER JOHN TURNER,

having been previously duly sworn was examined and testified as follows:

EXAMINATION CONDUCTED

BY MR. HOWARD:

Q State your name for the record.

A Officer John Turner.

Q Are you familiar with the address at 1059 Grant Street, S.E., Atlanta, Georgia, Fulton County?

A Yes, I am.

Q Did you go to that location on the 19th day of April, 1979?

A Yes, I did.

Q And would you tell the Court what you found at that location?

A Yes. First of all, 1059 Grant, S.E., is the location of J. B. Davis & Son Truck Body Service. Across the street, directly from that location, is a vacant lot bound by the dead-end of Grant Street and Atlanta West Point Line.

On that particular side of the street, on the hillside, on the north side of the railroad track, approximately half way down the hillside, the body of a white young male was discovered at that location.

Q How long did you estimate the body had been at that location?

A I had no way of making a determination. However, the Medical Examiner's office determined it to have been there a minimum of four days and a maximum of eight days.

Q Did you find the identity of that person?

A Yes. His name was Dewey Baugus.

Q Did you determine the age of that person?

A The victim was nine years old.

Q Officer, did you find out what was the cause of death of Mr. Baugus?

A Death was caused by strangulation, affixiation.

Q When was Mr. Thomas taken into custody?

A Mr. Thomas was arrested and placed in custody after we received information as to his possible involvement in this case on something else, however, he was served a warrant charging him with murder on the 20th day of April.

Q Prior to that time, had you talked to Miss Lynda Cook?

A No, I had not talked to her.

Q She had mentioned a railroad or some railroad tracks. Were there any railroad tracks located near the location of 1059 Grant Street?

A Yes, there were.

Q And how far were they away from where the body was

found?

A They were approximately five feet from where the body was found.

Q Now, Miss Cook also mentioned a pair of beige pants. Were you able to recover such pants?

A Yes. A pair of beige pants were discovered in the rear of 1054 Hill Street with what appeared to be blood stains on the front. However, this has not been determined. They are still at the State Crime Lab.

Q Did you take a statement from a gentleman by the name of Lowe?

A No, I did not take a statement from him. However, one was made by him on the 18th day of this month.

Q What relationship is there between Mr. Lowe and Mr. Thomas?

A He is his stepfather.

Q Now, Mr. Lowe stated that Mr. Thomas had also told him that he killed the little boy?

A Yes.

Q When did he give you that? When did he say that statement?

A According to Mr. Lowe's statement, he was not sure, it was sometime prior to the 18th day of April.

MR. HOWARD: Your Honor, we have no further questions.

THE COURT: Mr. Thomas, would you like to ask this

officer any questions?

MR. THOMAS: No, sir.

MR. HOWARD: We are going to rest, Your Honor.

THE COURT: Anything else you would like to say?

MR. THOMAS: I did not do this. I've got every reason to believe that she did.

THE COURT: I'll leave it up to the Grand Jury of Fulton County. The case is bound over to the Grand Jury.

C E R T I F I C A T I O N

G E O R G I A

FULTON COUNTY

I hereby certify that the foregoing transcript was stenographically recorded by me as stated in the caption. The witnesses were duly sworn to tell the truth, the whole truth and nothing but the truth. The colloquies, statements, questions and answers, thereto were reduced by typewriting by my direction and supervision.

The transcript is a true and correct record of the testimony/evidence given by the witnesses.

I further certify that I am not a relative, or employee, or attorney of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in the action.

This 14 day of October 1979.

PHILLIP GALLUCKI
Certified Court Reporter B518
and Notary Public. My Commision
expires 4-18-83.

Bell & Associates
COURT AND DEPOSITION REPORTERS

APPENDIX "E"

United States Court of Appeals
Eleventh Circuit
50 Spring Street, S.W.
Atlanta, Georgia 30303-3167

Miguel J. Cortez
Clerk

September 16, 1986

In Replying Give Number Of Case And Names Of Parties

TO ALL COUNSEL AND THE DISTRICT CLERK:

No. 85-8655 - DONALD WAYNE THOMAS v. RALPH KEMP
(DC No. 84-941-A)

MANDATE RECALLED AND STAYED TO AND INCLUDING September 30, 1986 (Thomas)

The Court has this day granted the recall and stay of the mandate to the date shown above. If during the period of the stay there if filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for writ in that Court, the stay shall contine until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June [illegible]980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

By copy of this letter to the Clerk of the District Court, we request that he return the opinion and judgment previously issued as mandate.

Very truly yours,

MIGUEL J. CORTEZ, CLERK

By: Angela L. Bickers
Deputy Clerk

Encls.

cc: Ms. Mary Beth Westmoreland
Mr. Stephen B. Bright
Mr. George H. Kendall

MDT-3

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-8655

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 16 1986
MIGUEL J. CORTEZ
CLERK

DONALD WAYNE THOMAS,

Petitioner-Appellee,
Cross-Appellant,

versus

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellant,
Cross-Appellee.

- - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Georgia

- - - - - - - - - - - -

O R D E R :

( ) The motion of appellee/cross-appellant, Donald Wayne Thomas, for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of appellee/cross-appellant, Donald Wayne Thomas, for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 30, 1986, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

Paul H. Roney
UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)

OPPOSITION BRIEF

ORIGINAL

NO. 86-5610

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DONALD WAYNE THOMAS,

Petitioner,

v.

RALPH KEMP, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record
For Respondent

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTION PRESENTED

1.

Did the district court properly decline to grant leave to amend the petition to add an issue challenging the lack of counsel at the preliminary hearing and did the Eleventh Circuit Court of Appeals properly find that any such absence of counsel at a preliminary hearing was harmless beyond a reasonable doubt based upon the facts of the instant case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED:

STATUTES CITED:

NO. 86-5610

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DONALD WAYNE THOMAS,

Petitioner,

v.

RALPH KEMP, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Donald Wayne Thomas, was convicted for the offense of murder in the Superior Court of Fulton County, Georgia, on October 24, 1979. Petitioner was sentenced to death by the jury after the jury returned a finding of the seventh statutory aggravating circumstance. See O.C.G.A. § 17-10-30(b)(7). Petitioner appealed his conviction and sentence to the Supreme Court of Georgia. On April 23, 1980 that court affirmed the conviction and sentence. Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980).

Petitioner then filed a petition for a writ of certiorari in this Court. This Court vacated the decision of the Supreme Court of Georgia insofar as it affirmed the death penalty and remanded the case to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980). Thomas v. Georgia, 449 U.S. 988 (1980).

On remand, the Supreme Court of Georgia issued a second opinion again affirming the death penalty under the seventh statutory aggravating circumstance. Thomas v. State, 247 Ga. 234, 275 S.E.2d 318 (1981). A second petition for a writ of certiorari was denied by this Court on September 23, 1981. Thomas v. Georgia, 453 U.S. 950 (1981).

Petitioner then filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. A hearing was held on that petition on February 11, 1982. On March 8, 1982, that court entered an order denying relief as to all grounds. Petitioner filed a motion to vacate the denial of habeas corpus relief which was denied on March 16, 1982. A subsequent application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on June 2, 1982. Petitioner then filed his third petition for a writ of certiorari in this Court on August 31, 1982. On November 1, 1982, this Court denied the petition and denied rehearing on January 10, 1983. Thomas v. Zant, 459 U.S. 982 (1982), rhng. denied, 459 U.S. 1138 (1983).

The instant petition for habeas corpus relief was filed in the United States District Court for the Northern District of Georgia on May 10, 1984. Evidentiary hearings were held on the issue of ineffective assistance of counsel and the question of whether the trial court should have had an evidentiary hearing on the Petitioner's competency to stand trial. Said hearings were held on February 28, 1985 and March 1, 1985. Post-hearing briefs were filed by both parties. At the hearing before the district court, counsel for the Petitioner indicated that an additional issue would be presented to the court at a later time, but that said issue had not been exhausted at the time of the hearing. This issue concerned the question of the lack of counsel at a preliminary hearing and was the first time this issue was mentioned before the federal court.

On or about February 21, 1985, the Petitioner filed a second petition for a writ of habeas corpus in the Superior

Court of Butts County, Georgia. This was the second state petition filed by present counsel on behalf of the Petitioner. In that petition, for the first time, Petitioner asserted that he was denied the right to counsel at his preliminary hearing. A motion to dismiss was filed by the Respondent asserting that the petition was successive under O.C.G.A. § 9-14-51. Both parties consented to proceeding without a hearing in the superior court.

On May 1, 1985, the Superior Court of Butts County entered an order dismissing the petition, noting that counsel for the Petitioner discovered the transcript of the preliminary hearing in the file of the Fulton County public defender. The same public defender represented the Petitioner at trial and cross-examined witnesses at trial based on testimony from the preliminary hearing. This counsel was also called to testify at the first state habeas corpus proceeding and was examined by present counsel at that time. The state habeas corpus court concluded, "Through the most basic interview of Petitioner's trial counsel prior to the first habeas hearing, habeas counsel could have determined if Petitioner was represented at his commitment hearing. There was no assertion that trial counsel was not available. To the contrary, this habeas petition indicates that trial counsel was a witness at the hearing on the first petition . . . . This Court can see no reason why this claim could not have been raised in the first petition." Second state habeas corpus order at 3. The state habeas corpus court went on to note, "Petitioner himself knew whether or not he was represented by an attorney at the hearing in April of 1979." Id. The court thus deemed that the claim was waived under Georgia law finding that the statutory waiver previsions of the Georgia Code "would be rendered meaningless if claims which could have been raised in an original petition are allowed to be raised one by one in what could be an endless succession of later petitions for habeas corpus relief." Id. On June 10, 1985, the Supreme Court of Georgia denied the application for a certificate of probable cause to appeal.

Counsel for the Petitioner then filed a motion for leave to amend the federal habeas corpus petition on June 17, 1985. The Respondent opposed the motion. On July 19, 1985, the district court entered its final order granting habeas corpus relief as to the death sentence but denying habeas corpus relief as to all other allegations. In particular, the district court addressed the question of the motion to amend and concluded the following:

> After reviewing the parties' argument on this motion and the evidence in the record of this case, this court finds that the petitioner has acted with undue delay in seeking to amend the petition at this time. petitioner's trial counsel, Mr. Coker, testified at the first state habeas hearing in 1982 when petitioner's present counsel was representing petitioner. Counsel could have discovered that the petitioner had no counsel at the preliminary hearing at that time if he had asked Coker. At the petitioner's trial, Coker used specific testimony given by Linda Cook at the preliminary hearing in repeated attempts to impeach her credibility. Trial Transcript at 359-60, 364. ("Trial T."). See also Trial T. at 521, 523, 527. This court believes that a review of this portion of the trial transcript should have alerted petitioner's counsel to the fact that a transcript of the preliminary hearing existed. The court also notes that petitioner's counsel could have reviewed Coker's file on this case, and discovered the copy of the transcript, at any time

> during his representation of the petitioner. If petitioner's present counsel concluded that trial counsel's cross-examination was based on notes taken at the preliminary hearing, early review of trial counsel's file would be all the more important.

District court order at 6-7. Thus, the district court exercised its discretion and denied the motion for leave to amend. In the alternative, the district court found that the lack of counsel was harmless error. The district court granted habeas corpus relief based upon its finding that counsel was ineffective at the sentencing phase and also found the charge at the sentencing phase was inadequate.

The Respondent subsequently filed an appeal challenging the finding of ineffectiveness by the district court and also challenging the district court's conclusions with regard to the charge at the sentencing phase. The Petitioner filed a cross-appeal challenging, among other things, the district court's denial of the motion for leave to amend and the finding as to the harmless error question on lack of counsel. On July 28, 1986, the Eleventh Circuit Court of Appeals entered an order affirming the district court in its granting of relief on the question of ineffective assistance of counsel at sentencing. The court affirmed the denial of relief on the other ground considered by the district court. As to the question of the preliminary hearing, the Eleventh Circuit noted that the district court held that the request for leave to amend was unduly delayed and that in any event the absence of counsel was harmless error. The court affirmed on the alternative ground of harmless error without discussing the question of leave to amend.

After the mandate had issued by the Eleventh Circuit Court of Appeals, the Petitioner filed a motion to recall the mandate and has filed the instant petition challenging the finding by the Eleventh Circuit Court of Appeals. No petition has been filed on behalf of the Respondent.

PART TWO

STATEMENT OF THE FACTS

Petitioner was convicted in the Superior Court of Fulton County, Georgia, for the murder of a nine year-old child, Dewey Baugus. The Supreme Court of Georgia on direct appeal found the following as the facts underlying the crime:

> On April 11, 1979, Dewey Baugus and a playmate left his mother's home on Primrose Circle in Atlanta to go to a ball game. After the game, the two children separated to return to their respective homes in the early evening darkness. This was the last time the victim was seen alive.
>
> The appellant, a 19-year-old male, lived in a rooming house on Primrose Circle. Linda Cook, the appellant's girlfriend, had stayed with him for approximately a week during the time in question. The appellant had kept her locked in the room when he was not there, with a bucket he provided as her only toilet facility. Linda Cook testified that when the appellant returned to the room on Friday, April 13, she noticed that he had a lot of blood on the front of his pants. The appellant took her to the railroad tracks behind Primrose Circle and showed her the body of the victim, lying face down, and told her that he had killed the child by beating him with a stick and choking him. In her presence, the appellant rolled the body over. Telling her that he had to make sure that he was dead, the appellant then jumped on the neck of the victim.

Thereafter, he threw the victim's body in the bushes. Thereafter, they returned to the room, where the appellant removed his pants and hid them behind the house. That same day, the appellant, again in Linda Cook's presence, admitted the murder to his stepfather, Enzor Lowe. However, his stepfather testified that he did not believe him, because the appellant was grinning about it.

On April 19, 1979, Calvin Banks discovered the body of the victim when he took a short cut on his way back from applying for a job at the Dolly Madison Cake Co. When the body was discovered, it was partially decomposed and the pants the victim was wearing were pulled down to mid-thigh level.

Sometime later, after she had stopped staying with the appellant, Linda Cook contacted the authorities and related what had occurred. She was charged with concealing a death and placed in juvenile detention. She pointed out to the authorities where the appellant had discarded his pants, and they were recovered. Crime Laboratory tests confirmed that the blood on the appellant's pants was human, International Type B. The blood type of the victim could not be establish due to decay.

Autopsy results showed the cause of death as asphyxiation and that numerous post- and ante-mortem bruises were on the body.

Thomas v. State, supra, 245 Ga. at 688-690.

Further facts will be developed as necessary to more fully explain the issue presented in the instant petition.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE DISTRICT COURT PROPERLY DECLINED TO GRANT LEAVE TO AMEND THE PETITION TO INCLUDE A CLAIM RELATING TO THE LACK OF COUNSEL AT THE PRELIMINARY HEARING AND, IN THE ALTERNATIVE, THE DISTRICT COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT ANY SUCH LACK OF COUNSEL WAS HARMLESS BEYOND A REASONABLE DOUBT UNDER THE FACTS OF THE INSTANT CASE.

Petitioner has asserted that the Eleventh Circuit Court of Appeals improperly applied a harmless error analysis to the alleged lack of counsel at the preliminary hearing in the instant case. Petitioner asserts that a harmless error analysis is not appropriate in the context of a capital case.

Initially, Respondent would note that this issue was only belatedly filed in the district court and the district court specifically found that because of the undue delay, the motion for leave to amend should be denied. On this basis alone, Respondent submits that this Court should deny the instant petition for a writ of certiorari. Even though the Eleventh Circuit Court of Appeals did not rule on this basis, this has been presented as a basis for the decision by the Respondent from the time the issue was raised in the district court and will clearly serve as a basis for denying the instant petition.

Additionally, Respondent has consistently asserted that the instant issue should not be considered based on the state procedural default. The state habeas corpus court declined to consider the merits of this issue as it was not properly presented to that court. Under state law all issues must be raised in the initial habeas corpus petition filed in the state court, and any issues not so raised will be deemed to be waived

unless they could not reasonably have been raised in the original petition or are constitutionally non-waivable. O.C.G.A. § 9-14-51; Dix v. Zant, 249 Ga. 810, 294 S.E.2d 527 (1982); Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983). As the state habeas corpus court specifically concluded that the issue was "waived" as a matter of state procedural law, there has been a procedural default as to this issue and no showing of cause and prejudice as is required under Wainwright v. Sikes, 433 U.S. 72 (1977). Therefore, this Court should decline to grant certiorari on this basis.

Finally, Respondent submits that the Eleventh Circuit Court of Appeals and the district court both properly found that the alleged denial of counsel was harmless beyond a reasonable doubt under the circumstances of the instant case. On April 29, 1979, the Petitioner was brought before the Honorable E. T. Brock, Judge of the City of Atlanta Municipal Court. At that time it was noted that the Petitioner had an opportunity to talk to a public defender and the Petitioner stated he wanted an attorney, specifically his attorney. Petitioner told the court at that time that a Mr. Standfield was his attorney and that he had hired Mr. Standfield and wanted h[illegible]resent. The court took a recess in the case while the cle[illegible]d to get in touch with Mr. Standfield. Mr. Standfield infor[illegible] the court that he did not represent the Petitioner. THe Petitioner insisted that he still wanted to have an attorney but refused to have one appointed by the court. The public defender had attempted to talk with the Petitioner on three separate occasions and on each occasion the Petitioner said he did not want to be represented by a public defender. The Petitioner insisted that he did not want a state lawyer. The court then concluded that the Petitioner had an ample opportunity to obtain his own lawyer and that by virtue of the fact that he had not done so in an ample length of time, he had waived the right. The court noted that it was the Petitioner's third appearance in court and that Petitioner had simply not

contacted an attorney. Thus, the court proceeded with the hearing. Under these circumstances, Respondent has continually submitted that a waiver should be found as was found by the municipal court judge. Due to the Petitioner's own actions, he simply failed to get an attorney. Petitioner was consistently advised of his right to have an attorney, the public defender had attempted to represent the Petitioner and that Petitioner had been brought to court on three separate occasions and had still failed to obtain his own counsel.

Even if there is no finding of waiver, the finding by the district court and the Eleventh Circuit Court of Appeals that the lack of counsel was harmless is clearly supported by the record and clearly conforms with the holdings of this Court. As acknowledged by the district court, a preliminary hearing is a critical stage in the proceedings under Georgia law. See State v. Hightower, 236 Ga. 58, 222 S.E.2d 333 (1976). In Coleman v. Alabama, 399 U.S. 1 (1970), this Court concluded that a preliminary hearing under Alabama law was a critical stage of the proceedings. The Court went on to remand the case to the state courts for a determination of whether the lack of counsel at that proceeding was harmless error under Chapman v. California, 386 U.S. 18 (1967). Coleman v. Alabama, supra, 399 U.S. at 11.

Petitioner has attempted to assert that Holloway v. Arkansas, 435 U.S. 575 (1978), somehow overruled that principle in Coleman, at least as to capital cases. Respondent submits that the courts below correctly found that Holloway does not mandate such a conclusion. In dicta in Holloway, this Court stated that if a criminal defendant did not have counsel at a critical stage, automatic reversal was required. The opinion in Holloway, however, did not even refer to Coleman v. Alabama, much less reverse that decision. Additionally, this Court has also referred to this harmless error principle in a footnote in Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317 (1983). In that footnote, this Court compared a case in which the court

declined to consider whether admission of a confession was unconstitutional because the error was harmless with Coleman v Alabama, noting that Coleman remanded the case for a harmless error determination. Illinois v. Gates, supra, 103 S.Ct. at 2346 n. 18.

The Eleventh Circuit Court of Appeals has also noted a distinction between Holloway v. Arkansas and a case in which a Petitioner contended Holloway barred a retrial. The court concluded, "In making this contention, [the Petitioner] overlooks the language of Coleman indicating that the denial of counsel at a preliminary hearing does not vitiate the defendant's subsequent conviction if the denial was 'harmless error . . . .'" Fleming v. Kemp, 748 F.2d 1435, 1443 n.26 (11th Cir. 1984); See also Chadwick v. Green, 740 F.2d 897 (11th Cir. 1984) and Takacs v. Engle, 768 F.2d 122 (6th Cir. 1985). Respondent submits that a reading of all the above showed that it is clear that the holding in Coleman v. Alabama remains good law and that a harmless error analysis is appropriate under the circumstances of the instant case. Although cases have emphasized the heightened and scrutiny to be given to capital cases, such usually occurs with circumstances which clearly would reflect on the greater discretion afforded to the jury at the sentencing phase and the jury's ability to consider more factors at a sentencing phase than at a guilt innocence phase. See, e.g., Turner v. Murray, ___ U.S. ___, 106 S.Ct. 1638 (1986). In the instant case, Respondent submits that there is no justification for a different rule in death penalty cases where there is no indication that heightened and scrutiny is necessary in relation to this particular phase of a proceeding.

Respondent also submits that the district court and the Eleventh Circuit Court of Appeals properly found harmless error under the circumstances of this case. The district court made the following findings with regard to this allegation:

After carefully reviewing the record in this case the court finds that the petitioner's lack of counsel at this stage of the proceedings was harmless error. It is clear in this case that petitioner's counsel had access to the transcript of the preliminary hearing because he used it to impeach the testimony of Cook and Lowe at trial. Thus, even though Petitioner's counsel was not present at the preliminary hearing, he was still able to effectively utilize important information that was produced at the preliminary hearing. See Coleman, 399 U.S. at 9, 90 S.Ct. at 2003. Another function of counsel at the preliminary hearing, highlighted by the Court in Coleman, is to expose fatal weaknesses in the prosecution's case. After reading the brief transcript of the preliminary hearing, this court fails to see how, if counsel had been present, he could have revealed defects in the State's case that were so great that the magistrate would have refused to bind the petitioner over. According to the Coleman opinion, another function of counsel at a preliminary hearing is to discover the case against his client. In the instant case, it is clear that petitioner's counsel knew the nature of the State's case against the petitioner because he did pretrial interviews with witnesses, which lead him to believe his best trial strategy would be to attack the credibility of these witnesses and impeach their testimony. The last factor highlighted by the Court in Coleman is the

importance of effective arguments on matters such as the necessity for early psychiatric examination or bail. The record shows that the petitioner was not harmed by the lack of counsel in this area because his attorney sought and received psychiatric examinations and evaluations of the petitioner. Thus, even if the motion to amend the petition to add this ground for relief was not unduly delayed, the court would deny habeas corpus relief on the merits of the claim based on its conclusion that the lack of counsel at this stage of the proceeding constituted harmless error.

District court order at 9-10.

The Eleventh Circuit Court of Appeals concurred with this reasoning, making conclusions similar to those of the district court and finding that "the state had carried its burden of on showing that Thomas was not prejudiced by his counsel's absence at the preliminary hearing." The court had previously cited Chapman v. California, supra, for the standard to be applied.

Respondent thus submits that even if the issue has been properly preserved and presented to this Court for review, the alleged lack of counsel at the preliminary hearing was harmless error under the standard of Chapman v. California, as found by both the district court and the Eleventh Circuit Court of Appeals. Thus, this Court should decline to grant certiorari on this issue.

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that this Court deny the petition for writ of certiorari filed on behalf of Donald Wayne Thomas.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

WILLIAM B. HILL, JR. 354725
Senior Assistant Attorney General

MARY BETH WESTMORELAND 750150
Assistant Attorney General

MARY BETH WESTMORELAND
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition to the petition for a writ of certiorari upon counsel for the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

George H. Kendall
88 Walton Street, N.W.
Atlanta, Georgia 30303

Steven B. Bright
165 Walton Street, N.W.
Atlanta, Georgia 30303

This 31st day of October, 1986.

MARY BETH WESTMORELAND
Assistant Attorney General

OPINION

SUPREME COURT OF THE UNITED STATES

DONALD WAYNE THOMAS *v.* RALPH KEMP, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86–5610. Decided December 1, 1986

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The United States Court of Appeals for the Eleventh Circuit held below that petitioner's Sixth Amendment right to the assistance of counsel was not violated when he was refused counsel at his preliminary hearing on a capital murder charge, because the denial of counsel at the preliminary hearing was harmless error.

I

Petitioner Donald Wayne Thomas was convicted of murder and sentenced to death after jury trial. The State of Georgia charged petitioner, who was then nineteen years old, with the murder of a nine-year-old boy. At the preliminary hearing held ten days after petitioner's arrest, petitioner requested an opportunity to retain private counsel, indicating that he did not wish to be represented by the public defender. The court denied petitioner's request, excused the public defender, and held the preliminary hearing in the absence of any defense counsel. The State's main witness, a fifteen-year-old mentally retarded girl, then testified without cross-examination that petitioner had told her he had committed the murder, and had shown her the body. This testimony differed in various material respects from the later testimony given by this witness at trial.

On direct appeal from petitioner's subsequent conviction, the Georgia Supreme Court affirmed the conviction and sentence. *Thomas* v. *State*, 245 Ga. 688 (1980). This Court granted certiorari, vacated the sentence of death, and re-

manded for reconsideration in light of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). *Thomas* v. *Georgia*, 449 U. S. 988 (1980). On remand, the Georgia Supreme Court reinstated the death sentence, without benefit of further briefing or oral argument. *Thomas* v. *State*, 247 Ga. 233, cert. denied, 452 U. S. 973 (1981). Having exhausted in state post-conviction proceedings claims of ineffective assistance of counsel and prosecutorial misconduct at the sentencing phase of the trial, petitioner's counsel brought a federal habeas corpus action raising those issues.

During the pendency of the federal petition, counsel, who had not represented petitioner at trial, first discovered the preliminary hearing transcript in the files of the public defender's office, and realized that petitioner had been denied counsel at his preliminary hearing. Counsel notified the District Court that Thomas would move to amend his federal habeas petition as soon as the new claim could be presented to the state courts for exhaustion. Relief on this claim was denied in new state proceedings, and petitioner's counsel moved to amend the federal petition. The District Court vacated petitioner's death sentence on the ground that petitioner had not received effective assistance of counsel at the sentencing phase of his trial, but denied the motion to amend the petition as untimely. As an alternative ground of decision, the District Court also held that even if the claim were timely presented, the denial of counsel at the preliminary hearing had been harmless error.

Both parties appealed from the District Court's order. The Court of Appeals affirmed. 796 F. 2d 1322 (CA11 1986). On the denial of counsel claim, the Court of Appeals adopted the District Court's alternative ground, holding that "[t]he prosecution has carried its burden of persuading this Court that, even if constitutional error was established, the error was harmless." *Id.*, at 1326. Finding that "Thomas' [trial] counsel had access to the transcript of the preliminary hearing," "knew the nature of the State's case," and "sought and received early psychiatric examinations and evaluations on

Thomas," the Court of Appeals concluded that "Thomas was not prejudiced by his counsel's absence at the preliminary hearing." *Id.*, at 1327.

II

It has been settled for more than half a century that a defendant facing capital charges is entitled to the assistance of counsel. *Powell* v. *Alabama*, 287 U. S. 45 (1932). The right to counsel, it was then recognized, is not merely a right to trial counsel, but a right to the assistance of counsel in preparing a defense throughout the period from arraignment to trial; defendants are "as much entitled to such aid during that period as at the trial itself." *Id.*, at 57. Our recognition of the right to counsel has substantially increased in the period since *Powell* was decided. See, *e. g.*, *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). It is astonishing to me that the Court of Appeals so readily determined, despite our repeated holdings to the contrary, that it is not *per se* constitutional error to deny the assistance of counsel to a defendant whose life the State intends to take.

In support of its conclusion that the denial of counsel in the preliminary hearing of a capital prosecution can be harmless error, the Court of Appeals relied upon *Coleman* v. *Alabama*, 399 U. S. 1 (1970), in which this Court remanded for consideration of harmless error under *Chapman* v. *California*, 386 U. S. 18 (1967), the denial of counsel at a preliminary hearing. This reliance is fundamentally misplaced, for *Coleman* was not a capital case. As Chief Justice Burger stated for the Court in *Holloway* v. *Arkansas*, 435 U. S. 475, 489 (1978), "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." *

---

*It is not open to question that the preliminary hearing held below was a "critical stage" in petitioner's prosecution. See *Coleman* v. *Alabama*, 399 U. S. 1, 9–10 (1970).

Our recent cases make clear that, contrary to the Court of Appeals' conclusion below, denial of counsel at any critical stage of a criminal prosecution is *per se* constitutional error. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland* v. *Washington*, 466 U. S. 668, 692 (1984). "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States* v. *Cronic*, 466 U. S. 648, 659 (1984) (footnote omitted). Petitioner's capital trial was unfair for precisely this reason. The Court of Appeals' casual conclusion that "[c]ounsel could not have revealed defects in the State's case so great that the magistrate would have refused to bind the petitioner over to the State's custody," 796 F. 2d, at 1327, is nothing more than speculation, of a kind which the Constitution will not countenance. Mere recitation of the words "harmless error" is not a constitutionally sufficient basis on which to permit the State to deny the assistance of any lawyer at all to a defendant against whom the State is seeking the death penalty.

I dissent from the denial of the petition for certiorari.